EXEMPTION FROM LOCAL TAXATION FOR WIRELESS SERVICE PROVIDERS

BEFORE THE

SUBCOMMITTEE ON
COMMERCIAL AND ADMINISTRATIVE LAW
OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED FOURTH CONGRESS

SECOND SESSION

JULY 25, 1996

Serial No. 76

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CONTENTS

HEARING DATE

OPENING STATEMENT

WITNESSES

LETTERS, STATEMENTS, ETC., SUBMITTED FOR THE HEARING

APPENDIX

EXEMPTION FROM LOCAL TAXATION FOR WIRELESS SERVICE PROVIDERS

THURSDAY, JULY 25, 1996

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COMMERCIAL AND
ADMINISTRATIVE LAW,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The subcommittee met, pursuant to notice, at 10 a.m., in room 2226, Rayburn House Office Building, Hon. George W. Gekas (chairman of the subcommittee) presiding.

Present: Representatives George W. Gekas and Jack Reed.

Subcommittee staff present: Raymond V. Smietanka, chief counsel; Susana Gutierrez, clerk; and Agnieszka Fryszman, minority counsel; full committee staff present: Diana L. Schacht, deputy general counsel.

OPENING STATEMENT OF CHAIRMAN GEKAS

Mr. GEKAS. The hour of 10 o'clock having arrived, this hearing of the Subcommittee on Commercial and Administrative Law of the Judiciary Committee will come to order.

I note the presence of the gentleman from Rhode Island, Mr. Reed, who, with the Chair, constitutes a working and hearing quorum for this subcommittee.

I wish to open my remarks by reading from the Congressional Record of February 1, 1996. In it the chairman of the Energy and Commerce Committee, Mr. Bliley of Virginia, is engaged in a colloquy with the gentleman from Illinois, Mr. Hyde, the chairman of the Judiciary Committee.

Mr. Bliley states, "Mr. Speaker, in reviewing section 602 of the bill as modified by the conference agreement"—meaning the telecommunications bill—"which deals with the preemption of local taxation for direct-to-home services, I wonder whether this provision should also include any present or future wireless service providers who transmit video programs to subscribers without using traditional wire-based distribution equipment, as the new local multipoint distribution services, or LMDS."

"I yield to the gentleman from Illinois, Mr. Hyde, the chairman of the Committee on the Judiciary."

Mr. Hyde now states, "Mr. Speaker, it sounds like essentially the same factual situation to me. I assure the gentleman that we would be willing to hold hearings in the Committee on the Judiciary on that subject later this Congress." Hence, this hearing.

We are serving a dual purpose in gathering here today. One, is to fulfill a commitment made on the floor and, two, to deal with an important subject matter relating to the recently enacted telecommunications bill.

I am very happy to have the panel of witnesses with us here today. The major question of today's hearing will be whether or not local taxation of wireless cable is appropriate. We'll be hearing about the technology involved as well as the views of the local authorities. I can imagine what that might be. We will also hear from the municipal governments themselves to determine how they view this whole arena of new activity.

The last item that I wish to mention is that this subcommittee is also pursuing another permanent commitment, which is the oversight duty of this subcommittee. Therefore, we are completing multipurpose objectives today by entertaining this hearing. I'm very eager to hear the testimony of our witnesses.

With that, I yield to the gentleman from Rhode Island, if he wishes to make an opening statement.

Mr. REED. Thank you, Mr. Chairman.

Just to note that the extraordinary changes in telecommunications caused by technology and regulatory changes force us, I think, to reevaluate almost on a constant basis many of those principles that we thought would never change. And so I think it's appropriate that we do conduct this hearing today.

I welcome all the witnesses and look forward to their testimony.

And thank you, Mr. Chairman.

Mr. GEKAS. I thank the gentleman.

A set of rules that we try to undergo in such a hearing: (1) we will restrict each witness to 5 minutes, and (2) we will accept each witness' written statement for the record, without objection. And so every word that you utter or write will appear in the record of this proceeding.

With that, we will begin by introducing the witnesses. First, we have Frank Shafroth, the director of policy and federal relations for the National League of Cities. Mr. Shafroth, aside from his personal service here in Washington, follows in the family line which has served here, as his grandfather was U.S. Senator from the State of Colorado during the First World War.

Next witness is Shant S. Hovnanian, the chief executive officer of CellularVision USA, a corporation involved in local multidistribution service, a broad-band, wireless technology which obtains video programming via satellite and transmits directly to subscribers without using traditional wire-based distribution.

Following Mr. Hovnanian, we have Dr. Michael R. Kelley, president of the George Mason University Instructional Foundation, which is the licensee of eight instructional television fixed services microwave stations in the metropolitan area. He is also founding director of the Wireless Cable Association.

Next is Mr. Theodore Steinke, the chairman of the National Instructional Television Fixed Service Association (NITFSA), a professional association for ITFS licensees and others interested in the instructional television service. The association has approximately 100 members consisting of K through 12 school systems, colleges

and universities, public broadcasting stations, and foundations and organizations established to provide this instructional service.

Finally, we have Richard A. Alston, who's president of the Wireless Cable Association. Mr. Alston is a graduate of Virginia Commonwealth University and the Massachusetts Institute of Technology. He has held various positions during his career, among them vice president for operations for Bell Atlantic in Virginia; controller and executive director for external affairs for C&P of West Virginia.

With that, we'll begin with the witnesses in the order in which we introduced them. Mr. Shafroth may proceed.

STATEMENT OF FRANK SHAFROTH, DIRECTOR OF POLICY AND FEDERAL RELATIONS, ON BEHALF OF THE NATIONAL LEAGUE OF CITIES

Mr. SHAFROTH. Thank you, Mr. Chairman. I appreciate your holding these hearings.

You've already given me quite a nice introduction. So let me just begin.

1996 has been an interesting year. It's the commencement year for the implementation of the Unfunded Federal Mandates Act of 1995. In fact, I met last night with Senator Kempthorne, and I'm supposed to be with him right now trying to deal with the Safe Drinking Water Act, which hopefully we'll see reported out of the conference committee tomorrow.

It's also a year in which the leading contender for the Presidency is carrying around in a vest pocket the 10th amendment to the Constitution. So our impression and hope from both the Unfunded Federal Mandates Act, and certainly from Senator Dole's interests, is that we will see less, not greater, intrusion into State and municipal authority in all areas, including the authority and ability to raise revenues to provide government services.

Our position here, as you predicted, is relatively simple. We do not think two wrongs make a right. It's interesting. Two years ago the DBS industry came to the National League of Cities and initiated discussions with us to develop a compromise to permit us to levy a 5-percent sales tax on direct broadcast satellite services. They clearly understood there were implications. There were local services and costs involved, and they knew they could not prevail in court. Unfortunately, the conferees chose to ignore the agreement which we worked out with the industry, and, thus, you have the preemption that has served to initiate this hearing today. Our view would be that adding still another exemption would put this Congress not only in direct contradiction to the Unfunded Federal Mandates Act and the 10th amendment, but on a very slippery slope.

If we look back, the State of Vermont adopted a tax on entertainment and amusements in 1969. That covers services that vary to as much as motion picture theaters, golf courses, ski areas, service charges of cable television systems, other audio or video programming systems that operate by wire, coaxial cable, light wave, microwave, satellite transmission, or other similar means. That has never been challenged since the State legislature adopted that, now more than 25 years ago.

If the committee were to add another preemption of State and municipal authority in this area, we can imagine but it would be a short time before other parts of the amusement industry; the entertainment industry; the information industry, which will change profoundly just in the next 3 to 4 years; the utility industry, which is going to go through extraordinary changes just in the next 2 years with deregulation of the electric industry—will all be at this committee to hold hearings and to seek actions to preempt our authority to impose any kind of local revenue or compensation provisions upon them. So we think adding to the wrong would put you in a very awkward position, and in the end could make a slippery slope where little is left to meet the growing economy at the local level.

The bottom line, Mr. Chairman and Mr. Reed, is that for cities—for citizens at the local level, it's critical to have the authority, as is granted under the Constitution, to determine what they want out of government, what kind of facilities, what kind of services, and, obviously, those very hard choices about how to finance what they want. I think you understand it well here because, as we watch in the reconciliation process this year, any new tax benefit, any exemption from Federal taxes forces the committees to adopt an equal and offsetting tax in another place.

I want to note further a very important factor. This year in the budget process, both as proposed by the President and as adopted by the Congress and in the budget resolution, every single dollar of reductions in Federal spending comes at the expense of State and local government. It's only the programs that do not directly affect State and local government that are growing—social security, defense, and, my guess is, medicare at the end of the year. So States and local governments will have far less resources, but, as we see today with the commencement of the welfare reform conference, States and local governments are going to have far greater responsibilities than ever before.

I note more particularly, and using the example of Pennsylvania, we met with Speaker Gingrich in March, with the most senior member of the Philadelphia City Council. One of the messages that member raised with the Speaker was that under welfare reform, there will be a $63 billion reduction in resources going to States and local governments. The funding will be block-granted to States. In the State of Pennsylvania, 25 percent of the welfare beneficiaries live in the city of Philadelphia. As this council member told the Speaker, never in the history of Pennsylvania has the State granted 25 percent of any program for the city of Philadelphia, and the chances this time are very unlikely. But the welfare recipients who currently live in Philadelphia, I'm quite certain, will not be moving to the suburbs; they will remain there and demand and need much greater services and benefits from the city.

So the bottom line is, at a time when Congress is saying, "We are going to give you much greater responsibilities and much fewer resources," it's the time when it makes it the most difficult to talk about preempting any flexibility or authority to raise revenues to meet greater needs imposed by the Congress. We all know—and I met with Congressman Franks on Monday, because he's deeply concerned in your neighboring State of New Jersey at the number

of middle-income, older people who are afraid that property taxes will cause them to lose their home that the preemption proposed here would most likely force higher property taxes in countless communities.

The more one takes——

Mr. GEKAS. We thank the gentleman, and we'll give him ample time to expand during the question period——

Mr. SHAFROTH. Thank you.

Mr. GEKAS [continuing]. That will follow.

[The prepared statement of Mr. Shafroth follows:]

PREPARED STATEMENT OF FRANK SHAFROTH, DIRECTOR, POLICY AND FEDERAL RELATIONS, ON BEHALF OF THE NATIONAL LEAGUE OF CITIES

Mr. Chairman, members of the Committee: Thank you for your invitation to testify. I am Frank Shafroth, Director of Policy and Federal Relations for the National League of Cities. I am here today to testify on behalf of NLC and the 15,000 cities and towns across the nation we represent on whether Congress should adopt legislation that would exempt from local taxation wireless cable service providers who transmit satellite-delivered video programming.

NLC is strongly opposed to any federal action which would preempt municipal revenue raising authority or which would provide an unfair advantage to some entertainment providers in our communities over others. Telecommunications is an area of increasing importance to municipalities. Our unfettered ability to raise local revenues in this rapidly growing area will help us keep our economies competitive.

The Telecommunication Act of 1996 and the legislative history explicitly recognize the authority of local governments to receive compensation for telecommunications providers' use of rights-of-way. Unfortunately, Congress was not so understanding of traditional local taxation authority unrelated to rights-of-way use. The 1996 Act preempts local taxation of Direct Broadcast Satellite (DBS) services.

Broadening the exemption to wireless cable companies will result in cities across the nation losing substantial revenues. Such an exemption undercuts revenues many cities currently collect and would begin a rush by all other providers of similar services to seek comprehensive preemption of municipal taxation authority.

Cities like Chicago, which as part of the city's financing package for the 1996 budget adopted a 7 percent "amusement tax" on gross receipt of providers of subscription video services and other forms of live entertainment, would face significant local consequences as result of the federal exemption. Chicago and other cities would be forced to shuffle their budgets in order to keep their budgets balanced.

The 1996 Act is designed to remove regulatory barriers and encourage competition among all types of communication companies including competition between satellite services and cable. The legislation, by encouraging competition, seeks to provide consumers with improved services at lower cost. Granting an exemption to the wireless cable industry would not benefit to the consumer. It would be anti-competitive.

The wireless cable industry is a relatively small provider of multi channel video services in terms of market share. Technological limitations, such as the channel capacity of the systems and satellite placement restrictions, have been blamed for the relatively low penetration rate of wireless cable systems. Exempting wireless cable providers from local taxes or fees will not increase the competitiveness of the industry.

Mr. GEKAS. We now recognize Mr. Hovnanian.

STATEMENT OF SHANT S. HOVNANIAN, PRESIDENT AND CEO, CELLULARVISION, USA, INC.

Mr. HOVNANIAN. Thank you very much, Chairman Gekas, Congressman Reed.

We, my company, CellularVision USA, is the pioneer of the very LMDS industry which you mentioned in the colloquy. We have video delivery in our marketplace. LMDS stands for local multipoint distribution service. It is a cell-based, wireless, interactive video, telephony, and data service. Just last week, the FCC

allocated spectrum in the 28 gigahertz band for the nationwide deployment of LMDS.

CellularVision USA currently operates a 49-channel LMDS video system in New York, the only commercially-licensed LMDS system in the United States. CellularVision USA and the LMDS industry will participate in FCC auctions of the 28 gigahertz LMDS licenses throughout the country, hopefully before the end of 1996. We are prepared to compete with incumbent video service providers to offer consumers a high-quality, low-cost competitive alternative. Right here, I would say that would be adding to the right and not to the wrong, because what we are doing is offering consumers choice and price reductions.

However, in order to truly compete, LMDS licensees must have regulatory parity with other competitors. Accordingly, we urge this subcommittee to propose the adoption of an exemption from the local taxation for wireless video services, including LMDS, similar to the exemption for direct-to-home services in section 602 of the Telecommunications Act of 1996.

In an LMDS system, satellite programming is transmitted by FCC-licensed spectrum to subscribers in a 6- to 8-mile cell. Also, LMDS will be licensed throughout the Nation in large geographic areas that exceed the boundaries of local municipalities. Thus, wireless video providers such as LMDS should not have their programming service subject to a patchwork of new local taxation regulations.

The exemption from local taxation of wireless video services such as LMDS is a necessity to ensure regulatory parity with other technologies providing similar service. And, therefore, it is vital to the ability of LMDS to compete in today's marketplace. LMDS will soon be deployed nationwide. If LMDS is subject to requirements such as local taxation that similarly-situated competitors such as direct-to-home service are not, LMDS licensees will be severely hindered and find it extremely difficult to compete. Also, these taxes will create a dramatic negative impact on the auction revenues that are anticipated by the U.S. Treasury from FCC auctions later this year.

We are not taking anything away from the local governments. We are merely adding to the competitive choice of consumers.

Thank you.

[The prepared statement of Mr. Hovnanian follows:]

Prepared Statement of Shant S. Hovnanian, President and CEO, CellularVision USA, Inc.

THANK YOU VERY MUCH, CHAIRMAN GEKAS AND MEMBERS OF THE SUB-COMMITTEE, FOR THE OPPORTUNITY TO TESTIFY ON THE ISSUE OF WHETHER CONGRESS SHOULD ADOPT LEGISLATION THAT WOULD EXEMPT FROM LOCAL TAXATION WIRELESS CABLE SERVICE PROVIDERS WHO TRANSMIT SATELLITE-DELIVERED PROGRAMMING. I WILL FOCUS MY TESTIMONY ON THE IMPORTANCE OF SUCH AN EXEMPTION FOR A NEW COMPETITOR IN THE VIDEO DELIVERY MARKETPLACE, LOCAL MULTIPOINT DISTRIBUTION SERVICE, OR "LMDS." I BELIEVE THAT YOUR ADOPTION OF SUCH AN EXEMPTION FOR LMDS IS, THEREFORE, NECESSARY TO ENSURE REGULATORY PARITY WITH OTHER TECHNOLOGIES PROVIDING SIMILAR SERVICE, AND THEREFORE VITAL TO THE ABILITY OF LMDS TO COMPETE IN TODAY'S MARKETPLACE.

MY COMPANY, CELLULARVISION USA, IS THE PIONEER OF LMDS, A CELL-BASED, WIRELESS, INTERACTIVE VIDEO, TELEPHONY AND DATA SERVICE SYSTEM. WE OBTAINED OUR FIRST EXPERIMENTAL LICENSE FROM THE FCC IN 1986, AND IN 1991 WE RECEIVED A COMMERCIAL LICENSE FROM THE FCC TO OFFER VIDEO SERVICE IN THE NEW YORK PRIMARY METROPOLITAN STATISTICAL AREA. WE ARE IN THE MIDST OF AN AGGRESSIVE BUILD-OUT IN NEW YORK, HAVING RECEIVED FCC APPROVAL TO EXPAND OUR SYSTEM THROUGHOUT OUR SERVICE AREA SEVEN MONTHS AGO. OUR SYSTEM CURRENTLY PASSES 900,000

HOUSEHOLDS, AND WE OFFER THOSE CONSUMERS A STUDIO QUALITY, LOW COST, 49-CHANNEL ALTERNATIVE TO CABLE TELEVISION.

WHILE CELLULARVISION USA CURRENTLY IS THE ONLY COMMERCIALLY LICENSED LMDS PROVIDER IN THE UNITED STATES, I UNDERSTAND THAT THE FCC WILL ISSUE LMDS LICENSES IN MARKETS THROUGHOUT THE COUNTRY BEFORE THE END OF 1996 - AUCTIONS THAT ARE EXPECTED TO GENERATE BILLIONS OF DOLLARS IN REVENUES TO HELP REDUCE THE FEDERAL DEFICIT. JUST LAST WEEK, THE FCC CONCLUDED A SEVERAL YEAR, OFTEN-CONTENTIOUS DELIBERATION BETWEEN THE LMDS AND SATELLITE INDUSTRIES, AND FORMALLY ALLOCATED 1 GHz OF SPECTRUM IN THE 28 GHz BAND FOR THE NATIONWIDE LICENSING OF LMDS.

CELLULARVISION USA AND OTHERS IN THE LMDS INDUSTRY ARE VERY EXCITED ABOUT THE OPPORTUNITY TO COMPETE IN THIS DEREGULATORY ENVIRONMENT USHERED IN BY THE TELECOMMUNICATIONS ACT OF 1996. WE ARE PREPARED TO COMPETE WITH INCUMBENT SERVICE PROVIDERS ON A LEVEL PLAYING FIELD, TO OFFER CONSUMERS A HIGH QUALITY, LOW COST COMPETITIVE CHOICE IN VIDEO, TELEPHONE AND DATA SERVICES. IN ORDER TO TRULY COMPETE, HOWEVER, REGULATORY PARITY WITH OUR COMPETITORS IS ESSENTIAL.

IN THE VIDEO MARKETPLACE OUR PRIMARY COMPETITION IS FRANCHISED CABLE SYSTEMS. LMDS ALSO COMPETES WITH OTHER WIRELESS PROVIDERS AND DIRECT BROADCAST SATELLITE SYSTEMS, AND TELEPHONE COMPANIES SHORTLY WILL PROVIDE A NEW SOURCE OF COMPETITION IN THE VIDEO

MARKETPLACE.

IN ORDER FOR NEW ENTRANTS LIKE LMDS TO HAVE A LEGITIMATE CHANCE TO SUCCEED IN THIS INTENSELY COMPETITIVE VIDEO MARKETPLACE, IT IS VITAL THAT NO COMPETITOR RECEIVE A SIGNIFICANT REGULATORY ADVANTAGE OVER ANOTHER. IN THIS REGARD, YOU HAVE INVITED ME TODAY TO OFFER MY VIEW ON CONGRESSIONAL LEGISLATION EXEMPTING FROM LOCAL TAXATION WIRELESS CABLE PROVIDERS WHO TRANSMIT SATELLITE-DELIVERED PROGRAMMING.

AS YOU KNOW, SECTION 602 OF THE TELECOMMUNICATIONS ACT OF 1996 PRE-EMPTS LOCAL TAXATION OF DIRECT-TO-HOME SATELLITE SERVICE. I BELIEVE THAT IT IS VITAL THAT SIMILAR PRE-EMPTION OF LOCAL TAXATION BE APPLIED TO LMDS AND OTHER WIRELESS PROVIDERS. AS CHAIRMAN HYDE RECOGNIZED IN HIS FLOOR DISCUSSION WITH CHAIRMAN BLILEY DURING THE FLOOR DEBATE IMMEDIATELY PRIOR TO THE HOUSE'S PASSAGE OF THE TELECOM ACT, THE PRE-EMPTION OF LOCAL TAXATION FOR DIRECT-TO-HOME SATELLITE SERVICE, AND FOR A WIRELESS VIDEO SERVICE LIKE LMDS, PRESENT ESSENTIALLY THE SAME FACTUAL SITUATION.

IN CELLULARVISION USA'S LMDS SYSTEM, AN OMNI-DIRECTIONAL TRANSMITTER AT THE CENTER OF A SIX-MILE-DIAMETER CELL SENDS OUT A VIDEO SIGNAL CARRYING 49 CHANNELS OF PROGRAMMING. SUBSCRIBERS AT LOCATIONS THROUGHOUT THAT CELL CAN RECEIVE THE SIGNAL WITH SMALL, SQUARE, FLAT ANTENNAS. IN AN LMDS SYSTEM, PROGRAMMING IS TRANSMITTED TO SUBSCRIBERS VIA FCC-LICENSED SPECTRUM, AND

SUBSCRIBERS PAY A FEE FOR THAT SERVICE. WHILE DIRECT-TO-HOME SERVICE IS NATIONWIDE, LMDS ALSO WILL HAVE NATIONWIDE REACH WHEN LICENSED BY THE FCC THROUGHOUT THE COUNTRY IN LARGE BASIC TRADING AREAS. MOREOVER, THESE LARGE GEOGRAPHIC LMDS SERVICE AREAS GENERALLY FAR EXCEED THE BOUNDARIES OF LOCAL MUNICIPALITIES.

CONSISTENT WITH THE PRO-COMPETITIVE AND DEREGULATORY POLICY GOALS OF THE TELECOM ACT, AND SPECIFICALLY, THE ACT'S TREATMENT OF DIRECT-TO-HOME SATELLITE SERVICE, WIRELESS VIDEO PROVIDERS SUCH AS LMDS, WHICH WILL SERVE LARGE GEOGRAPHIC SERVICE AREAS, SHOULD NOT HAVE THEIR SERVICE SUBJECT TO A PATCHWORK OF UNCERTAIN AND BURDENSOME FEES OR TAXES THAT COULD BE IMPOSED BY LOCAL JURISDICTIONS ON THEIR PROGRAM OFFERINGS. OF COURSE, WIRELESS VIDEO PROVIDERS, LIKE DIRECT-TO-HOME SERVICE PROVIDERS, WOULD REMAIN SUBJECT TO ANY OTHER APPLICABLE STATE AND LOCAL TAXES. TO FAIL TO EXTEND AN EXEMPTION FROM LOCAL TAXATION TO LMDS SIMILAR TO THAT AFFORDED DIRECT-TO-HOME SATELLITE SERVICE WOULD, IN EFFECT, FAVOR ONE TYPE OF NEW COMPETITION OVER THE OTHER, WITHOUT FOUNDATION, AND SERIOUSLY HINDER THE DEPLOYMENT OF LMDS.

MY PARTNERS AND I CREATED LMDS TECHNOLOGY IN 1986, AND WE HAVE SPENT A LONG AND DIFFICULT TEN YEARS AT THE FCC SEEKING TO OBTAIN AN ALLOCATION OF SPECTRUM FOR THE NATIONWIDE DEPLOYMENT OF THIS REVOLUTIONARY NEW SERVICE. JUST LAST WEEK, WE FINALLY OBTAINED THAT SPECTRUM ALLOCATION FROM THE FCC, AND NOW WE EXPECT THE FCC TO

AUCTION LMDS LICENSES BEFORE THE END OF THIS YEAR. AS LMDS IS POISED FOR DEPLOYMENT NATIONWIDE, OUR INDUSTRY MUST HAVE REGULATORY PARITY WITH OTHER PROVIDERS IN THE HIGHLY COMPETITIVE VIDEO DELIVERY MARKETPLACE. IF GIVEN A CHANCE TO COMPETE ON A LEVEL PLAYING FIELD, WE ARE CONFIDENT THAT CONSUMERS WILL FIND OUR COMPETITIVE PRODUCT EXTREMELY ATTRACTIVE AND WELL UNDER THE COST OF MARKETPLACE VIDEO ALTERNATIVES. HOWEVER, IF WE ARE HINDERED AT THE OUTSET AND ARE SUBJECT TO REQUIREMENTS SUCH AS LOCAL TAXATION THAT SIMILARLY SITUATED COMPETITORS SUCH AS DIRECT-TO-HOME SERVICE ARE NOT BURDENED WITH, LMDS OPERATORS WILL HAVE AN EXTREMELY DIFFICULT TIME COMPETING IN THE MARKETPLACE.

MR. CHAIRMAN, I HAVE PREPARED A DRAFT LEGISLATIVE PROPOSAL WHICH AMENDS SECTION 602 OF THE TELECOM ACT TO INCORPORATE AN EXEMPTION FROM LOCAL TAXATION FOR WIRELESS VIDEO PROVIDERS, INCLUDING LMDS. THIS PROPOSAL SERVES TO PUT ALL PLAYERS ON A LEVEL PLAYING FIELD.

THANK YOU.

COMPETITIVE VIDEO SERVICE PROVIDER ACT OF 1996

TITLE 1– DEVELOPMENT OF A COMPETITIVE VIDEO SERVICE MARKET

Sec. 101. PREEMPTION OF LOCAL TAXATION WITH RESPECT TO WIRELESS VIDEO SERVICES.

(A) AMENDMENT. — Sec. 602 of Telecommunications Act of 1996, P.L. 104-104, is hereby amended as follows to preempt wireless video services from local taxation:

(1) in subsection (a), by adding after "A provider of direct-to-home satellite service" the phrase "or wireless video service" and striking the period at the sentence and adding "or wireless video service."

(2) in subsection (b), by redesignating subparagraphs (3), (4) and (5) as (5), (6) and (7), respectively, and inserting new subparagraphs (3) and (4) as follows:

(b)(3) WIRELESS VIDEO SERVICE. — The term "wireless video service" means video programming transmitted by FCC authorized radio spectrum directly to subscribers, and includes the Local Mutipoint Distribution Service ("LMDS").

(b)(4) PROVIDER OF WIRELESS VIDEO SERVICE. — For purposes of this section, a "provider of wireless video service" means a person who transmits, broadcasts, sells or distributes wireless video service.

(3) in subsection (c), by adding after "taxation of a provider of direct-to-home satellite service" the phrase "or wireless video service".

Mr. GEKAS. We thank the gentleman, and we now move to the next panelist, Dr. Michael Kelley.

STATEMENT OF MICHAEL R. KELLEY, PRESIDENT, THE GEORGE MASON UNIVERSITY INSTRUCTIONAL FOUNDATION, INC.

Mr. KELLEY. Thank you, Mr. Chairman, Mr. Reed.

Wireless cable currently uses 33 microwave television channels in every community, and 20 of these are licensed as instructional television channels to local school boards, universities, community colleges, or other local, nonprofit educational institutions, and the wireless cable operator leases time on those channels from those local institutions. As a result, wireless cable, more than any other commercial entertainment service is truly a partnership between the business and the nonprofit, local educational community.

That business partnership between the wireless cable system operator and the local educational institution provides a continuing infusion of funds to the local school and college licensees. Though not a tax as such, the fees which each wireless cable company pays to the local ITFS licensees represents a direct payment to the educational community far in excess of the 5-percent usual franchise fee paid by the wired cable operator to the same local government entities. These fees help support educational institutions, allowing us to extend our reach into the community through televised distance education. At George Mason University in Fairfax, VA, the lease payments we receive from our local wireless cable company, CAI Wireless Systems each year amounts to more than $100,000, which we use for continuing distance education.

Wireless cable television already pays local income, real estate, personal property, and sales taxes, in addition to its substantial annual payments to the local educational institutions. It also pays for the radio frequency spectrum it uses through Federal auctions and through annual spectrum fees collected by the FCC and remitted to the U.S. Treasury.

In its use of the national airwaves, rather than the local rights-of-way, wireless cable is far more analogous to the direct broadcast satellite service than it is to wired cable. Like DBS, wireless cable transmits its signal through the air over microwave frequencies to rooftop dish antennas. Also like DBS, wireless cable does not use local rights-of-way. Congress exempted DBS from local franchise-like video programming taxes in the 1996 Telecommunications Act and it seems inconsistent, unfair, and discriminatory not to treat the emerging wireless industry the same way as DBS and provide a level playing field on which to compete. Given the chance, wireless cable can continue to provide a real choice for the local consumer and also benefit its local nonprofit educational partners.

Thank you.

[The prepared statement of Mr. Kelley follows:]

PREPARED STATEMENT OF MICHAEL R. KELLEY, PRESIDENT, THE GEORGE MASON UNIVERSITY INSTRUCTIONAL FOUNDATION, INC.

My name is Michael Kelley, and I am President of The George Mason University Instructional Foundation which is the licensee of eight Instructional Television Fixed Service microwave stations in the Washington, D.C. metropolitan area. I am also a founding Director of The Wireless Cable Association, and continue to serve

on the Association's Board of Directors representing ITFS interests. The George Mason Instructional Foundation operates a service called "The Capitol Connection" which will celebrate its 15th anniversary in December of this year. The Capitol Connection provides C–SPAN, C–SPAN II, CNN, CNBC, the open meetings of The Federal Communications Commission, The Federal Energy Regulatory Commission, and the National Transportation Safety Board along with George Mason University graduate and undergraduate courses for credit to law offices, government agencies, embassies, universities, schools, trade associations, corporate lobbyists, and many of the 50 State's legislative affairs offices here in the Washington area.

The George Mason Foundation and its Capitol Connection service were pioneers in Wireless Cable. When the FCC created the Wireless Cable service in 1983, we were the first ITFS licensee to lease excess capacity on our system to a Wireless operator, American Family Theater, which was never able to get the programming to make a success serving private homes, apartments, hotels and condominiums. Over the next twelve years, we leased excess capacity on our system to three other wireless operators who also struggled to deal with regulatory red tape, inadequate channel capacity, unfairly high costs for cable programming, and the totally uphill fight that every new business faces when the playing field is far from level. One of those three Wireless companies ended in bankruptcy, and two others just barely kept their heads above water until they could sell their business. Since September of 1995, we have been leasing excess capacity to a fifth Wireless entrant into the Washington market. It is a publicly traded company called CAI Wireless Systems, Inc., which is in a partnership with Bell Atlantic and Nynex to provide Wireless service to a number of U.S. cities, including Boston, New York, Baltimore and Washington. All of us hope that CAI and its partners will finally have success here in Washington, creating a Wireless Cable System that can be an industry showcase.

The Wireless Cable Service currently has access to a maximum of 33 microwave television channels in each community. In almost every community, 20 of the 33 available channels are licensed as Instructional Television channels to local School Boards, Universities, Community Colleges, Hospitals, or other local non-profit Educational Institutions and the Wireless Cable Operator leases time on these channels from local licensees in their home community. As a result of this, Wireless Cable, more than any other commercial television news and entertainment service, is truly a partnership between the business and the local educational and non-profit community. The Wireless Operator needs to use time on the instructional television channels. To keep their licenses, local educators must provide credited courses to enrolled students each school day. In every community where Wireless Cable is available across the U.S., "distance learning" programs are produced and transmitted by local educational institutions largely at the expense of the Wireless Cable operator whose up front capital expenditures for studio equipment in the school, microwave studio-to-transmitter links, and ITFS transmitters at the head end site have built a working system for the local educators, and whose monthly lease payments continue to fund that system on an ongoing basis.

This partnership between each Wireless Cable system and its local educational institutions constitutes a unique working relationship between business and education. It also provides a direct and continuing infusion of funds to the local educational community, either public, private, or both. Though not a "tax" as such, the fees paid to the local ITFS licensees become an ongoing cost of doing business for the Wireless Cable operator which in almost every locality represents a direct payment to the educational community far in excess of the usual 5% franchise fee paid by the wired cable operator to the same local government.

At George Mason University, the funds we have received since 1983 from our lease of excess capacity have helped us build an educational microwave point-to-point network that carries our courses for credit far beyond the reach of the wireless cable signal and out to Winchester, Leesburg, Manassas, and Woodbridge. George Mason courses for credit are today available in over 400,000 cable television households in Northern Virginia as well as on the Wireless Cable system in Washington, D.C. and suburban Maryland.

After so many years of frustratingly slow growth in the Wireless Cable industry, things are finally about to blossom. The Cable Consumer Protection Act of 1992 gave Wireless fair and equal access to programming. Last year, the F.C.C. streamlined the application process through its recently conducted Wireless Cable auctions. Just this past July 9th, the F.C.C. ruled that it would routinely grant wireless cable and ITFS applications proposing to use digital modulation, making Wireless Cable the first terrestrial video programming service authorized to go digital. At last, all the pieces seem to be in place for this industry to become a real competitor in multi channel video delivery. What a shame if local city, county, or even state govern-

ments begin to impose franchise-like taxes on this new industry, adding another heavy layer of expense just as the Wireless industry is poised to take off.

Wireless Cable already pays local income, real estate, personal property, and sales taxes in addition to its substantial monetary contributions to the local elementary, secondary, and post secondary schools. Wireless Cable also pays for the national spectrum it uses through auctions which help reduce the National Debt, and through annual spectrum fees collected by the F.C.C. at the request of Congress, and remitted to the Treasury's general fund. On the other hand, Wired Cable pays no annual spectrum fee to the F.C.C., does not pay for its channels at auction, and makes use of local rights of way rather than the public airwaves to transmit programming. As such it is fitting that Wired Cable pay a local franchise fee.

When you look at it more closely, it becomes clear that despite the similarity in their names, Wireless Cable is an entirely different entity than Wired Cable. In fact, Wireless Cable is more like a local Direct Broadcast Satellite Service than it is like Wired Cable. Like DBS, Wireless transmits its signal to rooftop dish antennas. Like DBS, Wireless uses national airwaves in the microwave frequency range. Like DBS, Wireless frequencies are auctioned and regulated by the F.C.C. Like DBS, Wireless will soon be a digital video service. Like DBS, Wireless does not use any local rights of way for its transmission paths. The major difference between Wireless and DBS is that Wireless is a local, terrestrial multi channel video service and DBS is a wide area space-based multi channel video service.

Today Wireless Cable serves nearly a million people in 200 U.S. communities. Its Instructional Television lease payments provide much monetary and equipment support to local educators. It pays its fair share of other state and local taxes and it also supports the federal Treasury by paying fees each year for its use of the national airwaves. For Congress to allow local governments to impose an additional franchise-like video programming tax on Wireless Cable when it clearly exempted the Direct Broadcast Satellite service from any similar tax in the Telecommunications Act of 1996, is inconsistent, unfair, and discriminatory to an emerging industry desperate for a level playing field in its attempt to become a viable and competitive video programming alternative.

Mr. GEKAS. We thank the gentleman, and we move swiftly to Theodore Steinke.

STATEMENT OF THEODORE STEINKE, CHAIRMAN OF THE BOARD AND CEO, NATIONAL ITFS (INSTRUCTIONAL TV FIXED SERVICE) ASSOCIATION

Mr. STEINKE. Thank you, Mr. Chairman. I'm very happy to be allowed to come before this committee and testify. My name is Ted Steinke. I'm chairman of the National ITFS Association, which is a professional association that has as members many ITFS operators like Mr. Kelley.

I'm also an employee of a university like Mr. Kelley. We are a long time ITFS broadcaster with over 24 years of experience.

I would like to expand a little bit on Mr. Kelley's explanation of what instructional television fixed service (ITFS), really does for the instructional community. Back in the sixties, there was a lot of talk about how instructional television and educational television could be used by schools. It soon became evident that one channel over the regular broadcast band would not be able to handle all the instructional needs of the schools. To help meet the instructional needs, the FCC created a band of TV channels to be used only for education, for instruction by schools.

This aid to education was welcomed by the schools. In fact, requests soon depleted all available channels in major cities. There were not enough channels to go around.

Then came the budget cuts of the seventies. As many of you know, schools were looking for ways to cut expenses. They did not have the tax base to support all of their needs. Technology needs money to pay operating, repair and maintenance costs. The schools

could not afford to replace aging equipment as it broke down. They stopped using the channels and were letting their ITFS systems go dark.

The FCC was concerned. They were seeing more and more ITFS channels not being used. To solve this problem, the FCC issued what many believe to be a landmark decision. The ruling in 1983 allowed instructional television license holders who were using channels reserved for instruction use only, to lease excess programming time to a wireless cable broadcaster. This solution provided income, to the educator which allowed them to continue to use their channels for instruction. This action has been a boon to the ITFS industry.

There are more instructional television broadcasters now than ever and it's all due to the wireless cable industry. A wireless cable broadcaster comes to town and says to the local educators, "If you will allow us to use some of your channels some of the time, we will give you money; we will give you technical support; we will give you administrative support in running these channels; we'll provide maintenance." This financial and other support allows the schools to broadcast instructional programs to students.

Schools use these instructional programs to meet many different needs. Some use them to make better use of master teachers. Through the ITFS system, a school system can use one master teacher to teach several classes in several buildings. Some schools are so small that they cannot afford to hire more than one foreign language teacher. Using ITFS allows that one teacher to teach a foreign language to various classes and schools. Without such a system, students in many schools would not be able to learn a foreign language.

The reason that I am here supporting this exemption is that the ITFS broadcasters are very dependent on our wireless partners having a successful business plan. Most wireless cable operators are entrepreneurs. They have a very fragile cash-flow position. As we see it, any additional unplanned for expense, could possibly put that wireless cable operator in jeopardy. If that wireless cable operator goes into bankruptcy or quits broadcasting, then all of the instructional service that depends on that revenue stream usually ceases.

There are several examples where formerly active ITFS broadcasters are no longer serving their school district because the wireless operator, for whatever reason, could not stay in business. Therefore, we are quite concerned that, if this additional tax is placed on the wireless operator, this would have a negative impact on the ITFS industry and the education of students in schools.

Thank you very much.

[The prepared statement of Mr. Steinke follows:]

PREPARED STATEMENT OF THEODORE STEINKE, CHAIRMAN OF THE BOARD AND CEO, NATIONAL ITFS (INSTRUCTIONAL TV FIXED SERVICE) ASSOCIATION

My name is Ted Steinke, I am the Chairman of the Board and Chief Executive Of fleer of the National ITFS (Instructional TV Fixed Service) Association. This is a professional Association for ITFS licensees and others interested in this instructional television service. We have about 100 members, approximately 80 of them are ITFS licensees. Our licensee membership consists of K12 school systems both public and private; both public and private junior colleges, technical schools, colleges and universities; public broadcasting stations; and foundation and organizations estab-

lished to provide this instructional service. Some members have only one channel. while others have over fifty.

The FCC created the ITFS channels in the late sixties. They established these channels reserved for educational usage to provide a vehicle for instructors to use this new tool, called instructional television. The early licensees were mostly K12 systems. Hundreds applied to use this new technology. In fact, at one time the demand was so great that the FCC required local committees be formed to review all applications from that community and to recommend to the FCC which ones should be given channels. Both public and parochial schools saw this tool as a very new way to reach the expanding student population. Some schools used ITFS to make their few master teachers available to more students. Others could not find enough foreign languages, "new math," science, music or art teachers to place in each of their school buildings. ITFS allowed them to distribute needed curriculum to all students.

Then came the seventies budget cuts. School system after school system dropped ITFS broadcasting. As valuable as the service was, they could not afford the technology costs. The number of ITFS operating systems was sinking to an all time low when John Curtis in 1978 contacted 38 licensees to establish this Association and to explore ways of getting financing for ITFS. John talked to many people and agencies here in Washington, pleading his case for funding for ITFS. He reached several sympathetic ears at the FCC and in 1983, that agency issued a landmark decision which allowed, for the first time, licensees of educational reserve channels (the ITFS channels) to lease programming time that they were not using to a commercial entity. Although many were skeptical at the time, this has turned out to be a win-win situation.

If they chose to sign a lease with a Wireless Operator, the ITFS broadcasters could now have an income stream that would support their instructional programing, and the airwaves could also be utilized by wireless cable operators at times not normally used by the ITFS broadcaster. Would this work? Could there be a partnership between educators and business? Today we can answer this question with a resounding yes!

In the mid eighties, there were only a few entrepreneurs that were willing to jump into this new unknown field of broadcasting. I had the privilege of being associated with one of them. I appear before you not only as the Chairman of the National ITFS Association, but also as a representative of an ITFS broadcaster of 24 years, The University of Wisconsin-Milwaukee. In 1985 the university, and three other IFS broadcasters signed agreements that paved the way for Mike Specchio to bring his People's Choice TV to the citizens of Milwaukee. Those were both exciting and trying times. Everyday seemed to bring a new problem, but we were also serving our instructional needs. The University benefited by having aging equipment replaced with new, maintenance and operating costs lifted from our backs, and much needed dollars to replace budget cuts, that allowed us to produce instructional programming for students taking university courses at their place of work. This partnership was a major boost to the off-campus instructional efforts of the university.

Similar success stories all over the United States can be told about these partnerships. Although Milwaukee had ITFS before 1983, many educational institutions were only able to implement this instructional tool after a wireless cable operator came to their community and provided the financial. technical, and personnel support needed to put such an operation on the air. ITFS now is booming. More channels, approximately 2,000 in the U.S., are licensed and operating now than ever before. Some licensees only have one channel, while others have over a hundred, all providing instruction to students of all ages. In the majority of cases, these ITFS broadcasters would not be on the air without the support of their wireless cable partner. These educational broadcasters just could not exist without the financial and other support the wireless operator provides them.

As Chairman of the National ITFS Association, I have talked with literally hundreds of ITFS broadcasters, educators that want to be ITFS broadcasters, wireless cable operators, government officials and other representatives. about ITFS. Many of these discussions are about money. How much should. can a wireless pay? What is fair? Compensation rates vary from company to company, but in most cases it is equal to or more than the 5% franchise fee cable companies pay to cities.

Wireless Cable is a relatively new industry facing many demands and pitfalls; Both the FCC and Congress have been very supportive of this industry in an effort to make it a viable competitor to cable television. Just as Wireless Cable is starting to flourish a new problem has appeared, the proposed by city, county and/or state governments franchise-like tax.

The 1996 Telecommunication Act preempted local taxation for Direct Broadcast Services (DBS). Wireless Cable, like DBS, is delivered to the customer over the air-

waves and crosses city/county/state boundaries and should have the same 'tax" protection. It does not use rights of way which is associated with franchising taxes.

If Congress does not act to extend this protection to the wireless industry, ITFS broadcasters are concerned that this additional tax will be the straw that breaks the camel's back and puts many wireless operators out of business. This would be a disaster to many ITFS broadcasters. They depend on the income they receive from the wireless operators to allow them to deliver their instructional programming to their students. Without the wireless operators, the ITFS operator in many communities could not exist. Wireless Cable is a fledging industry, operating on a very fragile. in many cases. balance between income and expenses. Additional taxes would upset that balance.

The wireless operators are part of the local economy, like the cable companies, and pay local income, real estate, personal property and sales taxes, unlike DBS operators. The wireless operator now also has to pay for use of the spectrum through auctions conducted by the FCC. To allow an additional unfair "tax" burden to be placed on these operators would be a blow to educators throughout the country. To level the playing field, I urge you to extend to the wireless industry the same preemption of local tax that one of their competitors, the DBS industry now enjoys.

Mr. GEKAS. We thank you, and now we defer to Richard A. Alston.

STATEMENT OF RICHARD A. ALSTON, PRESIDENT, WIRELESS CABLE ASSOCIATION

Mr. ALSTON. Thank you, Chairman Gekas and Congressman Reed, for having these hearings. My name is Richard Alston. I'm president of the Wireless Cable Association.

This hearing is important today because it focuses on an issue, as Dr. Steinke just indicated, that's critical to a small, but growing, industry—the wireless cable industry. It's absolutely essential that the very narrow preemption that was included in the Telecom Act for DBS services be extended to the other wireless broadcast services that are available in communities.

Our industry is small. We serve about 200 communities and have less than a million subscribers currently in the United States. It's a small industry, but it's poised for growth, and we believe that the Telecom Act of 1996 was really intended to encourage competition in the industry—competition throughout the telecom and entertainment industry. And extending this preemption to include the other wireless providers of entertainment services, such as the wireless cable companies, is consistent with a policy, the fundamental policy of the act.

We believe that allowing the localities to tax wireless cable operators for the use of public right-of-ways that they do not use is inconsistent with that policy. So it would not only be counter to the policy, but it would be discriminatory, and it would really stifle growth in this industry.

We're not asking for any changes that will provide a reduction for local taxes, and we're not asking that the Federal Government infringe on the authority of local governments to regulate airwaves. They really don't have any authority to regulate airwaves. Our operators today get their authority to operate through a process where they apply for licenses from the Federal Communications Commission. They pay for those licenses through an auction process, and they also pay, as was earlier mentioned, to rent the ITFS license capacity from ITFS license holders. So it's very important to us that we have this preemption extended.

I also want to thank you—this hearing is very timely. Just last week I was testifying in Maryland before the Budget and Taxation Committee on this very issue. And what we're finding as we talk to different State jurisdictions is that there's a lot of confusion about Congress' intention in the States. For example, because the Telecom Act was silent on wireless cable operators, but explicitly exempted the DBS operators from local taxation, some States are believing that there's an implicit encouragement there for localities to tax, to levy franchise-type taxes against wireless operators.

And there are a couple of examples that I can point to that we're aware of—Chicago and Richmond, California, for example. In Chicago and Richmond, they're both—there's a gross receipts tax basically of about 7 to 8 percent that's levied against the wireless cable operators. In both of those jurisdictions the franchise tax that the wire cable operators pay is deducted from their tax obligation under this new tax. This is called a video services tax that's being levied. So, in effect, there's a de facto franchise tax being levied against wireless operators who use only the airwaves and do not use public right-of-ways.

We are already pay, as I said, we pay on the Federal level to the FCC for the licenses through the auction process. This is an additional tax for a public right-of-way that we don't use.

Given the time that I've got, I won't try to describe the technology that we use, but if you're interested, maybe in the questions we can describe it a little bit better. But, clearly, there are three things that have poised this industry for growth, and they're very important. One of them is we've got technology today and technology developments that really encourage the spread of this industry and this type of technology. There are economics that clearly favor this industry, and public policy most recently is clearly favoring this industry.

On July 11, the FCC issued a digital declaratory ruling which lays down the framework that will allow our operators to convert to digital. Now that's important because today, under the analog scheme that we have deployed the technology, we have the capacity for only 33 channels. With the new digital technology that we're going to deploy, we'll have the capacity for in excess of 100 channels. And this industry really will be in a position to be a robust, viable competitor to the wired cable industry and also to the direct broadcast satellite industry that's developing in this country.

There are three key similarities that I'd like to point out, though, that are between wireless cable TV and direct broadcast satellite services. Both must apply to the FCC for permits and licenses. Both must pay for the use, through auctions, through the use of those licenses and those airwaves, through auctions and user fees, and both use no public right-of-ways in the provision of their services.

Some States have already recognized the similarities. Virginia and Pennsylvania, in particular, have already passed laws that provide the exemption that we're asking the Congress simply to provide on a national level on a preemptive basis for the rest of the country.

So, without this relief, if the localities are allowed to target wireless cable for these new taxes, it's going to put this industry at a

serious competitive disadvantage and stifle growth. So I'll end with that. I'll be happy to answer questions.

[The prepared statement of Mr. Alston follows:]

PREPARED STATEMENT OF RICHARD A. ALSTON, PRESIDENT, WIRELESS CABLE ASSOCIATION

My name is Dick Alston, and I am President of the Wireless Cable Association. On behalf of the industry, I thank Chairman Gekas and Ranking Member Reed and the entire Subcommittee for holding today's hearing. This hearing focuses on an issue of critical importance to the wireless cable industry that can have far-reaching effects on the ability of the industry to fulfill its promise as a real competitive alternative provider of subscription services. It is essential to extend the narrow preemption of local taxation for direct-to-home satellite video services (or DBS) that Congress enacted in 1996 to other wireless service providers who transmit video programs to subscribers without using traditional wire-based distribution equipment.

It was Congress' policy in the Telecommunications Act of 1996 to provide for a technology-neutral, non-discriminatory market structure to govern the provision of telecommunications. Extending local tax preemption to wireless cable will create parity among similarly-situated video programming service providers and, therefore, fulfill this congressional policy. Indeed, the 1996 Act reinforced Congress' policy of ensuring that competition replaces regulation as markets become more competitive. Simply put, it would be counter to this policy for localities to establish barriers to entry through discriminatory local taxation that frustrates this overriding national goal and halts the benefits that the wireless cable industry has already brought to the video services marketplace and to the consumer.

Mr. Chairman, I also want to thank you for the timeliness of today's hearing. Only last week I testified before the Senate Budget and Taxation Committee of the Maryland Senate on this very issue. We have found confusion in various states and local jurisdictions as to the exact meaning of the provision in the 1996 Act preempting local taxation with respect to direct-to-home service and whether Congress, by not preempting wireless cable from these taxes, was implicitly encouraging localities to tax the provision of these services. I am heartened by the fact that by holding this hearing, the Committee is sending a strong signal that it did not intend this omission to open the door for localities to tax other wireless providers of video services that are comparable of those delivered by direct-to-home satellite providers.

First, as a prelude to explaining why regulatory parity among wireless providers of video services is so important for an emerging industry and the public it seeks to serve, let me describe wireless cable. Basically, wireless cable operators deliver subscription television services comparable to traditional cable television services and satellite delivered direct-to-home services to consumers. Typically, a wireless cable system works as follows: the signal is sent by satellite to a local transmission tower where a microwave antenna re-transmits the signal to individual, often "smoke alarm"-sized, rooftop antennas on customers' houses. The signal is then sent along traditional cable wire from the customer's antenna to a descrambling device on the customer's television set. Both wireless cable and direct-to-home satellite services do not cross the public rights-of-way in order to deliver their programming to consumers. Thus, the key difference between both of these services and traditional cable is that both wireless television signals are delivered over-the-air to antennas on a customer's roof top rather than over land based cable wires. From the consumers' point-of-view, when you turn on your television set, wireless cable, direct-to-home and traditional wire-based cable all deliver look-alike programming services into the home.

Today, wireless cable operators provide service in 200 communities throughout the United States, and serve close to one million subscribers. Worldwide, there are approximately 4.5 million subscribers in over a dozen countries. Even though wireless cable is small compared to traditional cable's 65 million subscribers, it now has the ability to move forward rapidly.

In my testimony today, I hope to provide you with a brief overview of the history and future of the industry. Although wireless cable was once stifled by technological, business, and regulatory barriers, it has recently begun to bloom thanks to technological advances, capital influx, and a friendlier regulatory environment that, until this point, has avoided imposing unnecessary regulatory or tax burdens that impede the ability of competitors to deliver low-cost television programming services to consumers. It will be helpful for the Subcommittee to understand the changes that have affected the industry in the past as well as the changes that are currently afoot in the industry.

Over the past decade the wireless cable television industry has slowly, but steadily, emerged as a player in the subscription television market and is increasingly offering consumers a much needed alternative to traditional, wire-based cable service. Today, in addition to providing much-needed competition within the industry, the wireless cable industry gives customers a superior product that is usually 20 to 30 percent less costly than the comparable cable service in the same community. Wireless cable is also less susceptible to outages and less expensive to maintain and operate. Wireless cable, in contrast to other over-the-air subscription services like DBS, provides consumers with local programming that is essential for citizen involvement in local communities. Moreover, on July 11, 1996, wireless cable received clearance from the FCC to deploy digital technology that will increase a system's capacity to over 100 channels. All of this adds up to a local wireless cable television service that is a viable, less expensive choice for consumers.

The advantages of wireless cable stem from the technology that it employs. Instead of using miles of expensive and vulnerable wire to deliver its signals to customer's homes, wireless cable relies on the public airwaves to transmit its signal. This difference in technology also accounts for the different regulatory framework applicable to traditional cable and wireless services like DBS and wireless cable.

There are three key similarities between wireless cable and satellite delivered direct-to-home services that demand similar treatment by regulators. First, all wireless services providers must apply to the FCC for permits and licenses for use of federally-regulated spectrum. Because regulation of the airwaves lies in the FCC's jurisdiction, the FCC is the primary, and in some instances the exclusive, regulator of wireless cable and DBS.

Second, both wireless cable and DBS must pay for the use of their spectrum from the federal government through auctions and user fees. For wireless cable, the 13 commercial channels (known as MDS channels) that wireless cable operators may hold outright are now obtained through federal auctions and are new licenses to provide DBS services. And with regard to the remaining channels available to wireless cable operators, the 20 so-called Instructional Television Fixed Service (ITFS) channels, wireless cable operators must lease these channels from qualified education licensees so that it can aggregate its 13 MDS channels and 20 ITFS channels to offer a total of 33 channels in any given market. In order to lease these channels, however, wireless cable operators pay royalties to the local educational institution that amount, on average, to five to eight percent of gross revenues. Thus, wireless cable already is paying local institutions to use these airwaves.

Third, both wireless cable and DBS do not use the public rights-of-way to deliver their services. Indeed, it is for the use of the public rights-of-way that conventional cable companies must apply to local governments for a franchise so that they may use these rights-of-way to lay their cables. In return for using local rights-of-way, cable companies pay a franchise fee to the local government that usually is five percent of gross revenues. In light of these payments, it is clear that imposing franchise fees on wireless cable for use of public rights-of-way that it does not use, would be just as duplicative, unnecessary and unfair as it would be to charge cable companies for the use of airwaves that they do not use to transmit programming signals. Moreover, Congress in the 1996 Act clarified the definition of a cable system to ensure that wireless cable was not included and, therefore, not subject to franchise-like requirements and fees.

Numerous states already have recognized the similarities between DBS and wireless cable and, in their own telecommunications legislation have treated both wireless cable and DBS similarly. For example, both Virginia and Pennsylvania exempted DBS and wireless cable from local video services taxes when these states considered comparable new video service and entertainment taxes. A similar change was made to a bill proposed, but not enacted, in Maryland two years ago.

Not only have states recognized these similarities, but Congress has acknowledged the similarities between wireless cable and DBS in the Telecommunications Act of 1996. The 1996 Act expressly recognized that the best way to encourage the full development of advanced telecommunications and information services for the benefit of the American public is through competition and deregulation. In particular, the 1996 Act preempted local zoning ordinances that impair a viewer's ability to receive video programming services through broadcast, DBS or wireless cable antennas—thus, treating DBS and wireless cable similarly. Indeed, one of the major goals of the 1996 Act was to provide regulatory parity among like industries and providers of the same types of services.

The main difference, however, between wireless cable and DBS is one with important ramifications. The 1996 Act's local tax preemption for DBS grew out of the DBS industry's refusal to acknowledge any local government jurisdiction over the provision of DBS services. By contrast, wireless cable is a local business and pays local

property, sales, income and other business taxes but, like DBS, it does not make use of the public rights-of-way. In light of this, it also should not be subject to local taxation or charges comparable to cable franchise fees for its use of federally regulated airwaves. These charges and taxes would be duplicative and discriminatory in light of the lease payments wireless cable operators already make to local institutions to use their ITFS channels and if wireless cable operators were the only video providers required to pay them.

Indeed, this is exactly what has happened in several localities across the country. For example in Chicago, Illinois and in Richmond, California, each city has enacted a video services tax of seven or eight percent of gross revenues. In both cases, however, wired cable is permitted to deduct the franchise tax that it already pays to the local government for the use of the public rights-of-way. As a result, cable companies only pay two or three percent. And, because of the 1996 Act, DBS is exempted from the collection and remittance of these taxes. Wireless cable operators and consumers, however, are left having to pay the entire tax. On top of their federal auction fees and ITFS lease payments, not only are these taxes discriminatory, but they increase the cost to consumers for video services. Moreover, it is just plain wrong to impose franchise fees on wireless cable for the use of public rights-of-way that it does not use, as it would be to charge cable companies for the use of airwaves that they do not use to transmit programming signals.

Without relief from these taxes, much of the competition that Congress envisioned wireless cable to bring to traditional cable will be lost because of the discriminatory and duplicative treatment that wireless cable will receive from local governments. Moreover, without the requested relief, Congress' pursuit of a policy of competitive national telecommunications to ensure that all competitors in the cable industry can grow and prosper will be frustrated. This is the exact opposite result that Congress envisioned in the 1996 Act as these local taxes are being used to insulate the cable industry from the effective competition in the video delivery market.

It is important to realize that although the wireless cable industry, with over 200 operating systems that serve close to 1 million customers nationwide, has undergone expansion, it is only beginning to meet its potential as a rival to traditional cable television. We are still undergoing rapid technological advances and our market share keeps expanding. Our success is due largely to the fact that we have given the American consumer a more reliable, but less expensive alternative to cable television. That was the goal of Congress and the FCC and that is what we have begun to deliver. In addition, we have started to provide additional telecommunications services, such as high-speed access to the Internee, which will also be helpful to consumers. Localities should be permitted to stop our progress by implementing onerous taxation that only slows the growth of true competition.

I hope that this summary has given you an insight into the importance of wireless cable television as a competitive alternative to the traditional cable companies and the need for extending the preemption already afforded DBS from local taxation to wireless cable. The wireless cable industry now stands poised to gain a large share of the market by taking advantage of digital technology and friendly regulations—it should not be frustrated by local efforts to insulate wired cable from effective competition. A strong wireless cable industry is good for America and the American consumer. Thank you for allowing me to share my enthusiasm about the wireless cable industry and showing you why we in the industry are so excited about this technology.

WCA on the fast track

New president to push for new members and industry growth

By Michael Katz

As this week's Wireless Cable Association conference gets under way in Denver, the organization's new president Richard Alston, will answer the question 'Why is a guy who has spent his entire career in the telephone industry heading the WCA?'

This industry is very exciting, and this is related to what I did in my career," explains Alston, who, at 49—and after nine months of retirement—put aside a dream to sail around the world to join the WCA in April. "There is a convergence of technologies that has been going on for years, and that makes this a natural extension of working at Bell Atlantic."

Given the money and attention that telcos are dedicating to wireless cable it may be appropriate that the new WCA president worked for Bell Atlantic for 24 years. But Alston insists that wireless cable can stand on its own with or without telcos.

"I don't think we're dwelling that much on what the telcos do," Alston says. "They have deep pockets and they can help, but our major focus is—to speak not just to the telcos, but to everyone—the consumers, the employees, the regulators, the legislators and the financial community."

Barely two months on the job, Alston has planned a busy and ambitious agenda for the upcoming year, and expanding the association is high on the list. "We have a real opportunity to grow the membership of the WCA," Alston says. "It give us greater credibility, and there are many companies in the industry that are small start-ups that are not members of the association, and we intend to recruit them."

The wireless cable industry is growing rapidly domestically and internationally. According to WCA spokesman Andrew Krieg, there are 900,000 subscribers and 200 systems in the U.S., compared with 750,000 subscribers and 190 systems last year. The growth worldwide is more significant, Krieg says: the worldwide number of subscribers has increased to 4.5 million from 3.9 million a year ago. "I think there will be a boom in wireless," says Alston. "As soon as the conversion to digital is made, I think you will see much more rapid growth."

President Richard Alston: "My major goal is to make sure the wireless cable industry has every opportunity to grow to its full potential."

To accommodate the push for new members and industry growth, the WCA, for the first time, will hold a second major wireless convention next February in New Orleans. The winter show, Alston says, will run concurrently with the WCA's technology symposium. As soon as the Denver convention is over, Alston says, he and the WCA will be "exploring intensely" the possibility of another WCA show to be held next year in Europe or the Middle East.

"We're going to be more aggressive this year in our meetings and conferences program," Alston says. "It's important because every time we have a major show or meeting or conference, we create a real growth opportunity for the industry."

Alston also will concentrate on lobbying the FCC and Congress to make sure there are no regulatory or legislative barriers in the way. "My major goal for the Wireless Cable Association is to make sure the wireless cable industry has every opportunity to grow to its full potential," he says.

One of Alston's important focuses is to encourage the FCC to quickly issue the digital declaratory rulings that will lay the ground rules for wireless cable operators to convert their systems to digital. "This is very important," he says. "In the absence of the digital declaratory rulings, many of the wireless operators have stopped investing because they don't want to invest in analog technology when they know they are converting to digital."

On the legislative side, Alston wants to make sure that wireless cable doesn't fall between the cracks since it was not mentioned in the 1996 Telecommunications Act. His main concern is to convince Congress that wireless cable operators are exempt from paying franchise taxes to municipalities like DBS operators do, because public rights-of-way are not being used.

Some of the municipalities now see an opportunity to levy franchise taxes against wireless operators," says Alston. "We need to make sure that our operators don't have to pay these franchise taxes that would financially burden them in a way their chief competitors are not [burdened]."

Also on his agenda is to use the wireless cable infrastructure, as it becomes more ubiquitous, to do some interesting things with distance learning." Alston wants to return to the roots of wireless, which are in education. "That is the seed that grew wireless," he says, referring to the fact that wireless was first used to link campuses. "We can use wireless to take the classroom to people's homes." ■

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON

OFFICE OF
THE CHAIRMAN

July 8, 1996

Mr. Richard Alston
President
Wireless Cable Association
1140 Connecticut Avenue, NW.
Suite 810
Washington, D.C. 20036

Dear Mr. Alston:

Over the past two years, I have had the pleasure to address the annual Wireless Cable Convention and to meet and visit with many of the prominent wireless cable operators and equipment manufacturers who participate in this outstanding event each year. And each year I have been able to report on recent Commission actions that have helped wireless cable become viable competitors in markets throughout the United States -- from the streamlining of Commission processing regulations and expanding the protected service area to improving the channel loading for ITFS licenses and adopting a wireless cable auction plan.

Following in this tradition, it is with great delight that I can announce to you, in time for this year's convention, the Commission's adoption today of the Digital Declaratory Ruling. From this day forward, the Commission will routinely grant wireless cable and ITFS applications proposing to transmit digitally on a non-interfering basis. Through the magic of digital technology, wireless cable operators now will be able to increase the carrying capacity of their wireless cable spectrum to well over 100 channels -- a veritable gold mine for video programming distributors.

This ruling makes wireless cable the first terrestrial video programming service to be authorized to go digital. It will, I believe, further accelerate the ascent of wireless cable as a robust alternative to wired cable services in the United States.

Coupled with the conclusion of the recent wireless cable auctions, this action has removed any remaining regulatory impediments to the substantial growth that has been forecast for the wireless cable industry. Wireless cable operators will be able to move forward with certainty as they continue to build-out their systems and provide consumers with a real choice for video programming services.

Only through increased competition will consumers be able to benefit from today's action and experience the benefits of digital television. Today's action also provides the industry with enormous possibilities to advance the education of our Nation's children through the industry's unique relationship with educators and ITFS licensees.

I believe that this action also is consistent with this Commission's policy of enhancing choice and fairness for consumers and industry alike. I continue to applaud your efforts in bringing choice to consumers. Indeed, I am personally pulling for you to have much continued success in the communications revolution.

Sincerely yours,

Reed D. Hundt
Chairman

Industry History

Industry History

The FCC established wireless cable in 1983 and created a lottery system for obtaining licenses. The first wireless cable system went on the air in 1984. Currently, up to 33 channels are available per market for use in wireless cable systems in the United States.

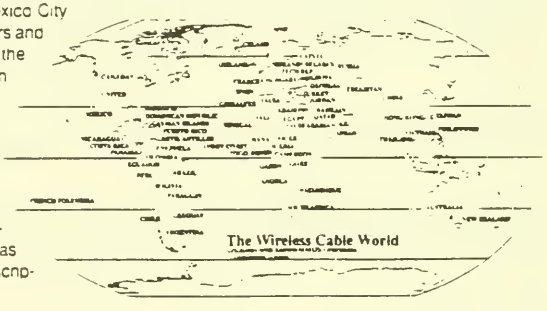
After the industry's creation, wireless operators experienced problems obtaining programming. The cable television industry restricted wireless cable's access to the majority of popular programming because they wanted to discourage the development of competition.

In January 1991 Senator John Danforth introduced S. 12 the Cable Competition and Consumer Protection Act providing for fair access to programming for cable competitors. Congress passed the cable bill in September 1992 and provided wireless cable operators a fair opportunity to compete in the subscription television market.

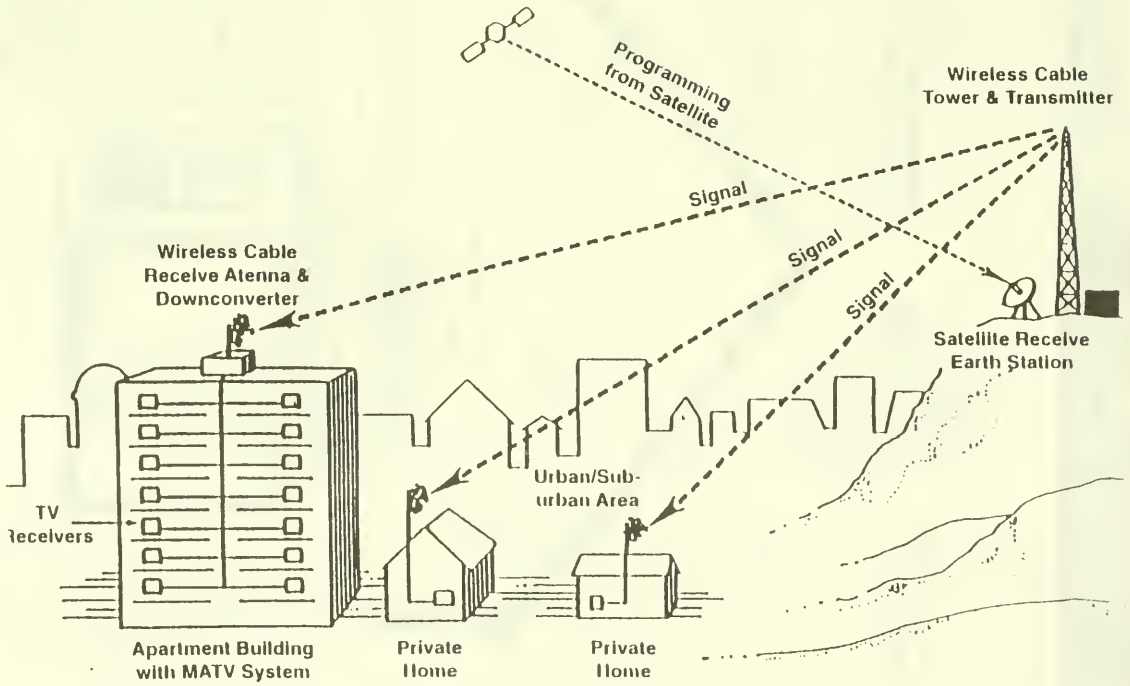
The industry's growth has been phenomenal since the passage of the 1992 Cable Act. With only 200,000 subscribers at the time, over 250% growth in wireless cable has occured resulting in approximately 750,000 subscribers at the end of 1994. With the infusion of over $1 billion in capital during the course of the last year, the industry again should double its growth in the next year.

Wireless systems now serve approximately 4.1 million subscribers in 59 nations, including 170 systems in the United States. The Mexico City system has over 450,000 subscribers and demonstrates that wireless cable is the technology of choice for subscription television around the world.

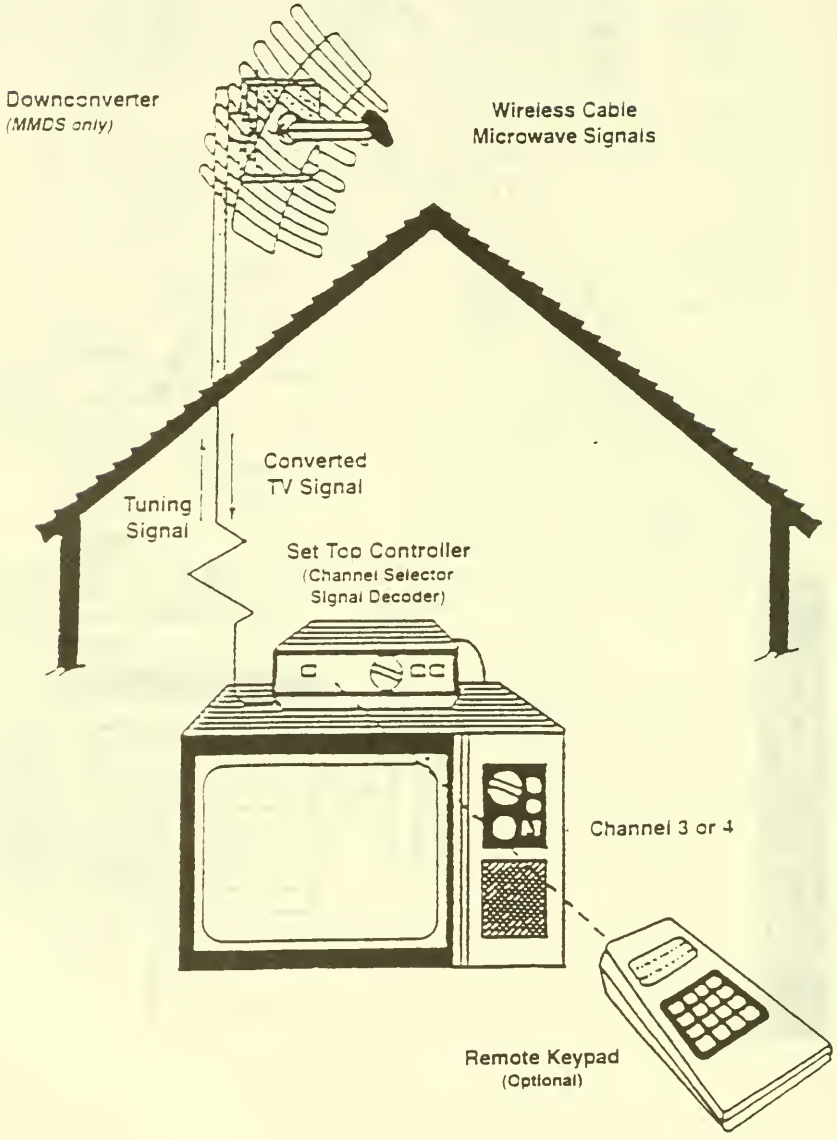
With the development of digital compression, wireless cable will be able to offer hundreds of channels to its customers. This will allow wireless cable to stay in the forefront of communications technology and secure its unique position as the fastest–growing provider of subscription television worldwide.


The Wireless Cable World

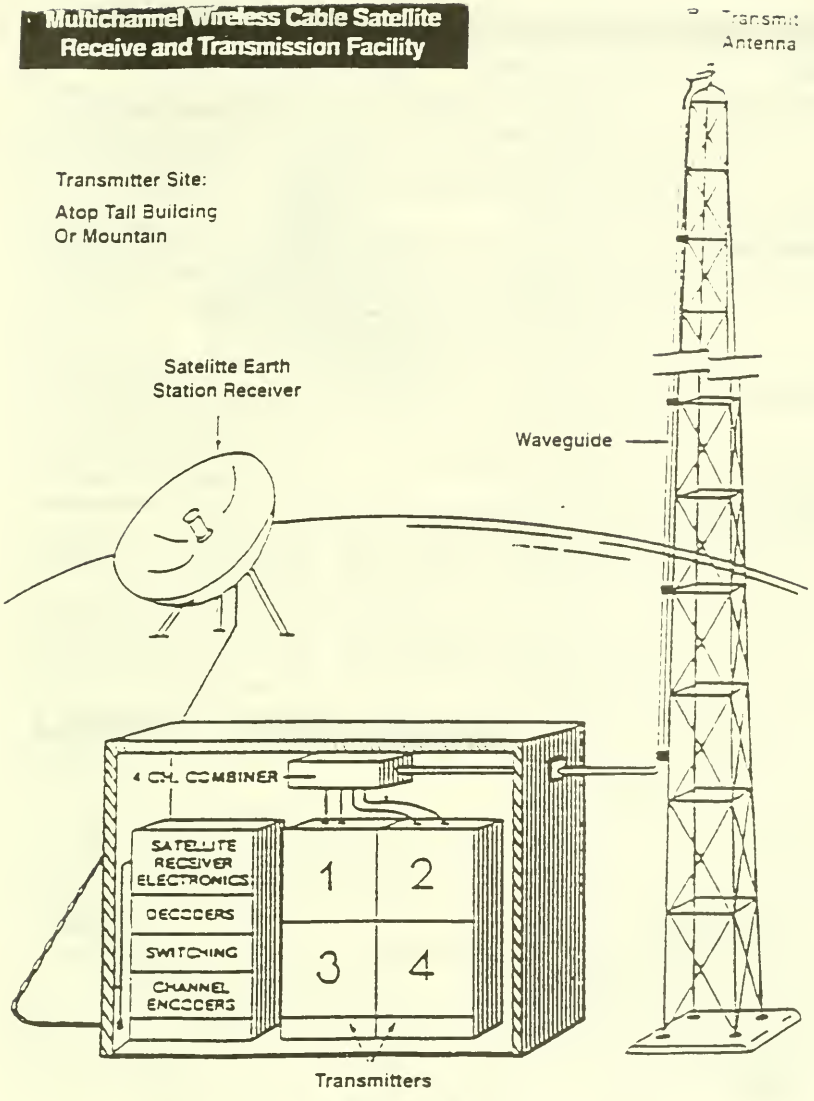
Multichannel Wireless Cable Program Distribution System



Multichannel Wireless Cable Subscriber Receiving Unit



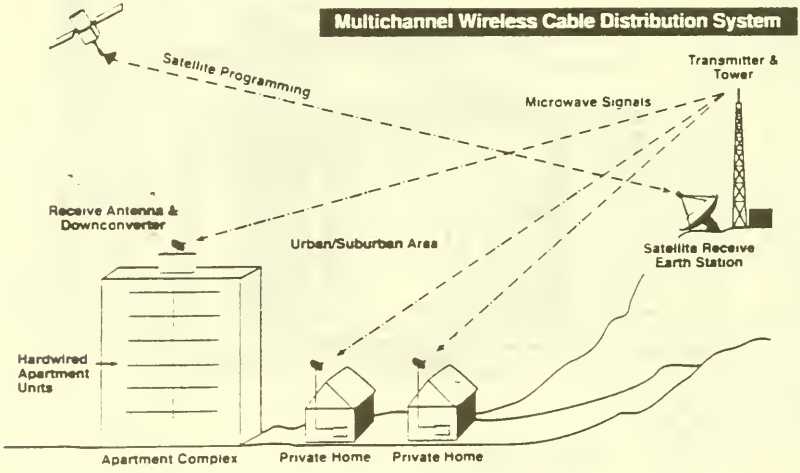
Multichannel Wireless Cable Satellite Receive and Transmission Facility



The Wireless Advantage: Wireless vs. Wired Cable

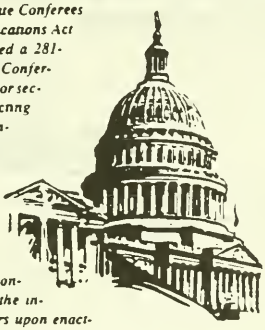
Issue	Wireless Cable	Wired Cable
Signal Reliability	Excellent. Wireless uses a small number of active electronic devices, such as signal amplifiers. All active devices in wireless systems are in the subscriber's home. They are therefore not vulnerable to outages caused by severe weather.	Problematic. Wired cable has inherent picture quality problems because of the large number of active electronic devices between the head-end and the subscriber, and because of outages caused by weather conditions.
Channel Capacity	33 channels. For the rights to lease 20 of those channels, wireless must air 400 hours a week of educational programming and pay royalties to the educational institutions which hold the licenses. With the development of digital compression technology, wireless will offer up to 300 channels.	120 channels. Average system provides 36 channels. Market research shows that consumers use an average of 7 channels.
Availability	Covers entire market regardless of density, provided line-of-site requirements are met.	Does not build in low-density areas due to high cost of laying cable.
Consumer Price	Competitive or priced below cost of traditional wired cable.	Always climbing. In April 1993, FCC proposed rolling back exorbitant cable rates.
Operational Costs	Much lower. Wireless cable has fewer service problems, no wired cable to maintain, and no franchise fees. Leasing fees from the educational institutions typically equals 5% of revenues.	Very high. Constant and expensive facilities maintenance is coupled with MSO franchise fees to municipalities and obligations to provide free public access channels.
Capital Requirements	Less capital intensive. Only transmitter and head-end equipment costs are up-front. Capital investment per subscriber is $300-$400, and a return on investment is 3-5 years.	More intensive. All costs are incurred up-front, because of installation and equipment costs. Capital investment per subscriber is $1200-$1500, and a return on investment is 7-15 years.

Multichannel Wireless Cable Distribution System



Telecommunications Act of 1996: Dra

House and Senate Conferees on the Telecommunications Act of 1996 have released a 281-page draft of their Conference Report. The major sections of the bill affecting the wireless cable industry are excerpted below, with a commentary by WCA Counsel Nicholas Allard and Michael Wroblewski of Latham & Watkins. Sections that would constitute a victory for the industry and consumers upon enactment are denoted by a checkmark. Those that would frustrate open competition if enacted are marked by a cross, and should be opposed.



Definitions of "Telecommunications," "Telecommunications Carrier," and "Telecommunications Service." *Sections 3(rr)(48),(49),(51).* The definitions of telecommunications and telecommunications services exclude wireless cable services. As a result, wireless cable operators are not telecommunications carriers and, thus, are not be subject to common carrier regulation.

☑ Telecommunications. The term 'telecommunications' means the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received.

Cable-Wireless Cable Cross-Ownership Overbuild Exception. *Section 202(i).* Provides an exception to the statutory provision which prohibits ownership of the wireless cable system by a cable operator operating in the same area when there are two or more unaffiliated wireline providers of video programming services.

☑ (I) ELIMINATION OF STATUTORY RESTRICTION. SECTION 613(a) (47 U.S.C. 533(a)) is amended.

(6) by adding at the end the following new paragraph: "(3) shall not apply the requirements of this subsection to any cable operator that is subject to effective competition as determined under Section 623(l)."

Antenna Zoning Preemption. *Section 207.* Preempts local zoning regulations of wireless cable antennas.

☑ SEC. 207. RESTRICTIONS ON OVER-THE-AIR RECEPTION DEVICES.

Within 180 days after the date of enactment of this Act, the Commission shall, pursuant to section 303 of the Communications Act of 1934, promulgate regulations to prohibit restrictions that impair a viewer's ability to receive video programming services through devices designed for over-the-air reception of television broadcast signals, multichannel multipoint distribution service, or direct broadcast satellite services.

Cable System Definition. *Section 301.* Amends the definition of a cable system to exclude wireless cable systems that do not use any public rights-of-way.

☑ SEC. 301. CABLE ACT REFORM.

(A) DEFINITIONS.

(2) CHANGE IN DEFINITION OF CABLE SYSTEM. Section 602(7) (47 U.S.C. 522 (7)) is amended by striking 'facility that serves only subscribers in 1 or more multiple dwellings under common ownership, control, or management, unless such facility or facilities uses any public right-of-way,' inserting '(B) a facility that serves subscribers without using any public right-of-way.'

Uniform Rate Structure. *Section 301(b)(2).* Eliminates the uniform rate schedule requirement when a cable operator faces effective competition. Provides that cable operators may offer bulk discounts to multiple dwelling units even when there is not effective competition in the market, provided that the cable operator does not charge predatory prices to multiple dwelling units.

☑ (2) SUNSET OF UNIFORM RATE STRUCTURE REQUIREMENT IN MARKETS WITH EFFECTIVE COMPETITION. Section 623(d) (47 U.S.C. 543(d)) is amended by adding at the end thereof the following: 'This subsection does not apply (1) a cable operator with respect to the provision of cable service over its cable system in any geographic area in which the video programming services offered by the operator in that area are subject to effective competition, or (2) any video programming offered on a per channel or per program basis. Bulk discounts to multiple dwelling units shall not be subject to this subsection, except that a cable operator of a cable system that is not subject to effective competition may not charge predatory prices to a multiple dwelling unit. Upon a prima facie showing by a complainant that there are reasonable grounds to believe that the discounted price is predatory, the cable system shall have the burden of showing that its discounted price is not predatory.'

Language

Extension of Program Access Requirements to Ico-Owned Programming. *Section 301(i).* Extends the existing program access provisions applicable to cable operators to common carriers or their affiliates that provide video programming directly to subscribers

"(i) COMMON CARRIERS. Any provision that applies to a cable operator under this section shall apply to a common carrier or its affiliate that provides video programming by any means directly to subscribers. Any such provision that applies to a satellite cable programming vendor in which a cable operator has an attributable interest shall apply to any satellite cable programming vendor in which such common carrier has an attributable interest. For the purposes of this subsection, two or fewer common officers or directors shall not by itself establish an attributable interest by a common carrier in a satellite cable programming vendor (or its parent company)."

Preemption of Local Taxation with Respect to Direct-to-Home Services. *Section 602.* Preempts local taxation of DBS services

SEC. 602. PREEMPTION OF LOCAL TAXATION WITH RESPECT TO DIRECT-TO-HOME SERVICES.

"(a) PREEMPTION. A provider of direct-to-home satellite service shall be exempt from the collection or remittance, or both, of any tax or fee imposed by any local taxing jurisdiction on direct-to-home satellite service.

"(b) DEFINITIONS. For the purposes of this section—

"(1) DIRECT-TO-HOME SATELLITE SERVICE. The term 'direct-to-home satellite service' means only programming transmitted or broadcast by satellite directly to the subscribers' premises without the use of ground receiving or distribution equipment, except at the subscribers' premises or in the uplink process to the satellite.

"(2) LOCAL TAXING JURISDICTION. The term 'local taxing jurisdiction' means any municipality, city, county, township, parish, transportation district, or assessment jurisdiction, or any other local jurisdiction in the territorial jurisdiction of the United States with the authority to impose a tax or fee, but does not include a State.

"(3) TAX OR FEE. The terms 'tax' and 'fee' mean any local sales tax, local use tax, local intangible tax, local income tax, business license tax, utility tax, privilege tax, gross receipts tax, excise tax, franchise fees, or telecommunications tax, or any other tax, license, or fee that is imposed for the privilege of doing business, regulating, or raising revenue for a local taxing jurisdiction. ▲

No New, Special Taxes On Wireless Cable!

LEGISLATIVE UPDATE

by Michael Wroblewski

During coming weeks, Congress will finish its comprehensive rewrite of the nation's telecommunications laws to encourage advanced services through competition and deregulation.

The draft legislation recognizes that a serious obstacle faced by emerging providers is the increasing threat that localities may impose unfair taxes and fees that insulate the cable industry from effective competition.

Unfortunately, the bill preempts such taxes levied on the direct-to-home (DTH) satellite industry, but ignores a wireless cable industry that has essentially the same status.

In doing so, the "reform" bill would take us back into the era when governments skew the rules of the marketplace to favor certain industries over their competitors.

Last year, legislatures in Virginia and Pennsylvania recognized the basic similarity of wireless cable and DTH services when legislators rejected attempts to authorize local jurisdictions to create new special taxes and fees on competitors to franchised cable systems. Localities wanted such taxes even on services that do not use the public rights-of-way (such as streets and utility poles).

But the local tax movement is gaining new momentum. The Chicago City Council recently enacted a seven percent video entertainment tax to be paid by all multichannel video programming distributors.

Michael Wroblewski is on attorney at Latham & Watkins, which is Counsel to the WCA.

In a striking example of unfairness, hard-wired cable customers get a credit against the tax because of the franchise fees for the use of public rights-of-way. So, wireless cable and DTH customers in Chicago would pay the full seven percent, even though they're not using city property as their distribution platform!

The proposed telecom bill, however, would preempt localities from being able to tax DTH customers. Wireless cable customers would be left holding the bag, alone.

These special, new local taxes make no sense, especially in view of the substantial funds that wireless cable operators already provide locally.

- Wireless cable operators already pay local property taxes.
- Wireless cable operators already pay licensing fees comparable in size to franchise fees to local educational institutions to lease ITFS channels to offer wireless cable services.
- Wireless cable operators already pay federal auction fees for acquiring wireless cable spectrum.

To achieve the benefits of competition for consumers, both wireless and satellite providers of video programming must be exempted from local efforts to impose new taxes and fees. Using this logic, the WCA has had a good record so far at the legislatures, but lacks the resources for what could turn into a 50-state effort every session.

To ensure fairness and open competition, urge your Representative or Senator to extend DTH's tax preemption to wireless cable systems. ▲

Predatory Claim Filed On MDUs

OpTel, Inc., one of the largest private cable operators in the U.S., filed a complaint with the FCC on Dec. 19 charging Multimedia Cablevision with engaging in predatory pricing to reduce competition in one of its franchise markets, Lisle, IL. ▲

Mr. GEKAS. Thank you.

We'll pause for a moment and receive a briefing from our faith clerk as to what's happening on the floor.

[Mr. Gekas consults with staff.]

Mr. GEKAS. All right, with that in mind, we will recess this hearing. I would invite you to come back, so we can pose the questions that are burning in our brain.

And we'll recess—you say four votes altogether—three. To be safe, we'd better say about 5 of 11 we'll reconvene.

We stand in recess.

[Recess.]

Mr. GEKAS. The time of the recess having expired, we'll have a round of questions, the Chair will be limited to 5 minutes for the first round.

In part of your statement, Mr. Alston, which was stated in a different way by Mr. Steinke, you were talking about the rental phase of the channels that now are relegated to education purposes; is that correct?

Mr. ALSTON. Yes.

Mr. GEKAS. Are we talking about an annual fee that is paid by the wireless people; is that it?

Mr. ALSTON. Right now in the current system, the way the technology works today, it's all analog, and the capacity that that's deployed out there today supports 33 channels. Thirteen of those channels are for commercial use, and our commercial operators actually bid for those in the auction process. The other 20 are licensed to educators. Now——

Mr. GEKAS. That's what I'm talking about. The 20 that are licensed to educators——

Mr. ALSTON. The commercial operators——

Mr. GEKAS [continuing]. Can all 20 of them be leased out?

Mr. ALSTON. Yes, but there's a requirement that those 20 continue to support educational programming 20 hours a week per channel. Twenty hours a—yes, a week per channel.

Mr. GEKAS. Oh, I see.

Mr. ALSTON. So——

Mr. GEKAS. So it wouldn't be full use of a channel if all 20 were rented out, as it were?

Mr. ALSTON. That's right. So that's 400—per system, there's 400 hours of educational programming provided over a wireless cable system.

Mr. GEKAS. And if we did not grant this relief which is sought by what you have requested here, then that wouldn't change. Your situation wouldn't change at all.

Mr. STEINKE. Our concern, Mr. Chairman, is that this would add an additional expense to the wireless operator, and that this additional expense may be pushing that operator toward ceasing operation.

Mr. GEKAS. Where would he go? Where would that operator go? I'm being a devil's advocate here. Where would that operator go if this relief were not granted and the local municipalities would be able to tax? Where would they go?

Mr. STEINKE. The——

Mr. GEKAS. Oh, I see, is there a channel in bankruptcy that they——

[Laughter.]

Mr. STEINKE. They would cease operation. They would not be broadcasting anymore.

Mr. ALSTON. I think the issue, the thing that we want to stress here is that these are small entrepreneurial businesses for the most part, that they are growing, but they are small. They struggle with their cash-flow situation. They already pay sales taxes, property taxes, and other local taxes that a normal business would pay, a small business that operates in a locality. They pay for, through the auction process, for the right to use—to provide service, and they pay the ITFS licensees, represented here, for the use of those educational channels. So they're paying a lot.

The additional tax, an additional tax, a franchise tax for the use of right-of-ways that they don't use is a burden. For example, in Chicago the tax rate is 7 percent. That's an additional 7 percent gross receipts tax right off the top. Some of these operators, their financial situation is marginal enough that that literally makes their business case less attractive, and it could ultimately drive them out of business.

And if the commercial operators go under, then it's going to be difficult for the ITFS people to continue to support the programming that they want to provide, because they need the support of the commercial operators.

Mr. GEKAS. And in the same vein, Mr. Hovnanian was talking about the auction period fast closing in upon us.

Mr. HOVNANIAN. Yes.

Mr. GEKAS. I take it that the lament here would be that, if the tax rates were maintained, that the bid that you would make in the auction would thereby have to be higher, and, therefore, less competitive. Is that——

Mr. HOVNANIAN. Well, you would actually bid a lot less for the spectrum, which would diminish——

Mr. GEKAS. Oh, I see.

Mr. HOVNANIAN [continuing]. The proceeds to the U.S. Treasury, if you could bid at all.

Mr. GEKAS. And you——

Mr. HOVNANIAN. One of the key points here is that we are an entrepreneurial-based industry, wireless cable as well as the new LMDS, and we have to attract capital to invest in our equipment, and that capital comes in a lot of different flavors, one of which is debt. And we cannot borrow additional monies to build out our systems if a large portion of the cash flow is going to yet another tax.

Mr. GEKAS. Mr. Shafroth, to give you a little background, I've worked mightily with the League of Cities in my area throughout my entire public life in various fields, including in-lieu-of-taxes concepts throughout Pennsylvania and many other problems. So I come at this with some experience.

Could you tell me—maybe I'm being melodramatic here—what is the difference between radio and the wireless capacities that we're talking about here for television? In other words, if there's a radio station—and I visit all of them in my area—with their big anten-

nae and their facilities, that property is taxed. The employees are taxed. But the beam out to the radios at home is not taxed, is it?

Mr. SHAFROTH. I think it's taxed under certain ordinances in some cities.

Mr. GEKAS. Really?

Mr. SHAFROTH. It depends upon what exactly——

Mr. GEKAS. I never heard of it.

Mr. SHAFROTH [continuing]. Is provided there. So this obviously is a matter for local decision. If it's some kind of amusement or entertainment, indeed, that's the way most of these ordinances and State statutes read, Mr. Chairman.

Mr. GEKAS. Are you saying that in my area there's a——

Mr. SHAFROTH. In Pennsylvania I'm unaware of any, Mr. Chairman.

Mr. GEKAS. Me, too. But, anyway, even if you're absolutely correct, the Congress has, in my judgment, acted and then left people out in the lurch who are in similar circumstance. If we act on this, we'd be acting—even if everything else is queazy in its reasoning—to balance the equities. And that's——

Mr. SHAFROTH. Mr. Chairman, I think there are two kinds of equities. There's the first question: where is that ultimate bright line that says it's OK to preempt here, but the rest of the industry, whether it's utility—that uses any kind of wireless means to provide services or products to citizens—I don't know how one can draw a line once you get on a slippery slope.

The second part of equity is, since we have States and municipalities that have had these kinds of revenue means for years and years, if you take something off the plate, as you well know up here, for the plate to stay full, it's going to be higher property taxes for every other business and every other citizen in the community. There's no free lunch here. So if you tell this industry, "Congress is going to provide you a free lunch here," it simply means everyone else is going to have pick up their share and pay more. That affects your constituents, every one of our constituents.

Mr. GEKAS. The time of the Chair has expired.

We refer and yield to the gentleman from Rhode Island.

Mr. REED. Thank you, Mr. Chairman.

My understanding is that companies like Mr. Hovnanian's would pay all property taxes. If they had a facility, they'd pay property taxes. They would pay whatever is the prevailing sales tax for goods and services in the community, but that what they're questioning now is a franchise tax, in effect. My understanding is that wire cable companies do pay such a franchise tax, principally because they use a common carrier, the poles, the physically-used municipal assets. Now I'm just wondering, Mr. Shafroth, it's pretty easy to justify a tax on a wire cable person using town services. How do you justify, without the use of a common carrier, the franchise fee?

Mr. SHAFROTH. Well, we testified under existing local authority and constitutional authority, affirmed by the Supreme Court in the *Quill* decision in 1992, Congressman. Further, I note that in many instances there are no property taxes paid. Part of what distinguishes the wireless cable industry is that some of those antennas might, in fact, be outside municipal boundaries, so there are, in

fact, no property taxes paid, even though services are provide to citizens in the form of entertainment and amusement.

Mr. REED. But doesn't that go to the whole issue of nexus—that if you have a tower 35 miles away from the community, and that's all—that's the closest contact you physically have with the community, and you're beaming in your microwaves into the community, then, you know, one side says, well, they're not paying property taxes because it's not my community. Then it's hard to say they have a nexus to pay any kind of tax.

Mr. SHAFROTH. Well, hard, but it wasn't hard for the Supreme Court to say, as long as that facility is within the State limits, that satisfies the nexus test.

Mr. REED. Well, you know, again, I think this issue is not so much about constitutional law; it's about whether statutorily we're going to provide some type of even playing field between these new technologies. And I guess I find with respect to the equities it's a harder case—and you may or may not admit this—a harder case to make for these types of services, harder than cable, wire cable, which is physically there physically using telephone poles to operate their system.

I guess the other question I have, and some of the operators—and I think the chairman alluded to it—is it's just the impact of these franchise fees potentially on your operations, and maybe Mr. Alston knows or anyone——

Mr. ALSTON. Well, sure. I think the key here, at least the point that we would like to make, is that these taxes, if levied, are clearly discriminatory, in that the different players, the different competitors in this industry would not be paying the same taxes, would be paying different tax rates.

In Chicago, for example, which is a real example, not a hypothetical one, that we can point to, the wired cable operators are allowed to deduct their franchise fee from the video services tax. This leaves with an effective tax rate of 2 to 3 percent. The DBS operators pay no tax because of the exemption in the Telecom Act of 1996. And that leaves the wireless cable operators paying the full burden of the tax at 7 percent. So there's a discriminatory issue here.

One of the real benefits that wireless cable brings to the marketplace is that, because our cost structure, the capital invested, is somewhat lower than it is to launch satellites or to build wired cable networks with repeaters and all that sort of thing in it, we can offer a lower-cost service, a comparable lower-cost service to the consuming public. And that helps drive down the cost, and there's a benefit for everyone that consumes these types of services.

This additional 7 percent tax, if we carry the full burden of it, drives our costs up, and, therefore, our prices up, and makes this industry less competitive, at a time when it's trying to grow to a critical mass that will be self-sustaining.

Mr. REED. Thank you.

Mr. Chairman, I don't believe I have any questions, further questions.

I want to thank the panel for their insights.

Mr. GEKAS. I, too, wish to express the gratitude of the subcommittee for the excellent testimony. And even with the tenor of

the subject matter, you have elevated the consciousness of the members of this subcommittee. I, as chairman of the subcommittee, will say to you that I have instructed my staff to prepare a suitable amendment—a bill it would have to be now or an amendment to some other bill—to reflect the creation of the even playing field.

To Mr. Shafroth, I say that this will give you an additional opportunity between now and full committee to further demonstrate your views on it. But for now, I'm convinced that we must follow through with at least the preparation of proper legislation, proper from the standpoint of the advocates, and then continue the debate until the matter comes before the Judiciary Committee.

With that, this meeting and hearing is adjourned.

[Whereupon, at 11:35 a.m., the subcommittee adjourned.]

27-102 96 – 2

APPENDIX

STATEMENT OF NYNEX CORPORATION

ON WHETHER CONGRESS SHOULD ADOPT LEGISLATION TO EXEMPT FROM LOCAL TAXATION WIRELESS SERVICE PROVIDERS WHO TRANSMIT SATELLITE-DELIVERED VIDEO PROGRAMMING

House Judiciary Subcommittee on Commercial and Administrative Law

July 31, 1996

NYNEX, a global communications and media corporation that provides a full range of services in the northeastern United States and around the world, wishes to submit testimony regarding the issue of whether Congress should adopt legislation to exempt wireless service providers who transmit satellite-delivered video programming from local taxation.

Summary:

Congress exempted direct broadcast satellite video systems (DBS) from local taxes and fees in the Telecommunications Act of 1996 based on the theory that DBS operators have no nexus with the local communities because of the way in which they deliver services. Wireless cable service providers deliver their services in a similar manner.

These two industries should be treated similarly with respect to local taxation. For Congress to impose an additional franchise-type tax on wireless cable when it specifically exempted DBS from this local tax is unfair and discriminatory. Congress should adopt legislation to ensure these two developing industries are able to compete on a level-playing field.

Comparison of DBS and Wireless Cable Service Technologies:

DBS or "direct-to-home" satellite services transmits programming via satellite directly to subscribers equipped with satellite receivers at their premises. Similarly, wireless cable transmits its signal via satellite to a local transmission tower equipped with a microwave antenna that re-transmits the signal to rooftop antennas on customers' premises.

Both DBS and wireless cable transmit signals through the air to rooftop satellite receivers or antennas. Unlike wired cable service providers, DBS and wireless cable do not use public rights-of-way to deliver programming.

The key difference between DBS and wireless cable is that DBS transmits the programming directly to the subscriber's receiver. Wireless cable transmits the signal first to a local transmission tower, which then re-transmits the signal to the customer.

Tax Treatment of DBS and Wireless Cable Service - An Issue of Fairness:

One of the goals of the Telecommunications Act of 1996 was to provide regulatory parity for similar industries and providers of the same types of services. Despite this goal, §602 was adopted. Section 602 of the Act preempts local taxation of DBS programming under the theory that DBS providers do not have a sufficient nexus with the individual communities in which their services are delivered.

NYNEX agrees with this position. DBS providers do not use the public rights-of-way or the services of local communities. They provide a national service. At best, they may have some small physical presence in a community if they own the satellite receivers located at the subscribers' premises. This presence is minimal, however, and it is not located in the public right-of-way. DBS providers also note that requiring national DBS companies to comply with a patchwork quilt of local taxing requirements would impose an intolerable administrative burden that could cripple the industry.

Local taxation of wireless cable services should be preempted by Congress for these same reasons.

Wireless cable service providers also provide a national service without using public rights-of-way. The only physical presence of a wireless service provider in a local community may be a radio communications tower. This tower is comparable to the satellite receivers owned by the DBS providers. Both the tower and the receiver represent a minimal physical presence. Most importantly, the tower and the receiver are not located in a public right-of-way. In addition, requiring national wireless service providers to comply with tens of thousands of local taxing requirements will stifle the development of this dynamic industry.

It is fundamentally unfair to impose a tax on one technology but provide an exemption from the tax for a similar technology. This type of public policy inhibits competition, which was the goal of the Telecommunications Act of 1996. By preempting local taxation of DBS services but allowing these taxes to be imposed on wireless cable services, Congress is favoring one industry over another. As a result, the wireless cable industry will have a difficult time fully competing in the marketplace.

Conclusion:

Congress should adopt legislation to ensure that DBS services and wireless services are able to compete on a level-playing field. Congress should provide the wireless cable industry with an exemption from local taxation as it did for the DBS industry in the 1996 Telecommunications Act. DBS and wireless are similarly-situated video service

providers and should be treated similarly with respect to local taxation. Providing special tax treatment for DBS without providing similar treatment to wireless is unfair, discriminatory, and flawed public policy.

TESTIMONY OF MAYOR RICHARD M. DALEY, CITY OF CHICAGO

Submitted to the House Subcommittee on Commercial and Administrative Law of the Committee on the Judiciary on Preemption of Local Taxation With Respect to Wireless Cable Services

July 31, 1996

Mr. Chairman and members of the House Subcommittee on Commercial and Administrative law, I appreciate the opportunity to present the views of the City of Chicago, as you consider the advisability of legislation that would preempt municipalities from collecting revenues from wireless cable service providers who transmit satellite-delivered video programming.

The City of Chicago has consistently worked to provide city services at the lowest possible cost to the taxpayer. While we continue to cut waste in city departments and search for new ways to make government more efficient, our ability to maintain adequate levels of police protection, invest in infrastructure improvements, maintain clean streets, and provide other vital day-to-day government services is dependent upon our revenue raising authority. This is particularly the case amid continuing reductions in federal and state resources. As Mayor of the City of Chicago, I must therefore respectfully oppose any federal action which would preempt municipal revenue raising authority in this area. Moreover, I hope that the Committee will utilize the hearings on this issue as an opportunity to review and seek repeal of the local taxation exemption for Direct Broadcast Satellite (DBS) services included in the Telecommunications Act of 1996 which was similarly opposed by the City of Chicago.

Enactment of the legislation under consideration would create an unfunded federal

mandate that would have significant and immediate local consequences. Legislation exempting wireless cable service providers from local taxation would reduce the city's current tax base. Currently, the city collects a 7% amusement tax on paid television programming, including programming which is transmitted by satellite. The constitutionality of this tax has been upheld by the Illinois Appellate Court. A tax exemption would, thus, affect local revenues which have already been allocated in the city's 1996 budget plan. The budget shortfall which would necessarily result would demand reductions in current government programs or alternative tax increases. Moreover, the legislation threatens to create a precedent for other service providers to seek similar exemptions. The very fact that the wireless cable industry now seeks to broaden the prior exemption secured by DBS service providers is evidence of this inevitable industry pattern. The cumulative impact of these exemptions would severely impair the city's ability to finance government services.

The decision by local government to tax cable service is one that should be made by local political processes. The economic burden of these taxes falls on local residents; if taxes are excessive, local electorates will hold their officials accountable. The policy choice about whether to utilize amusement-type rather than property or other taxes is best made at the local level, as opposed to imposing a nationwide solution on all local governments.

The creation of a tax exemption for a selective market participant runs counter to our mutual goal of increasing competition as a means of fostering new innovations in technology. Carving out an exemption for providers of wireless cable service would establish a skewed playing field by giving this particular service provider a distinct advantage over other technologies competing for the same consumers. These same consumers would also be denied

the benefits of increased competition among telecommunications service providers -- improved choices at a lower cost.

Arguments that wireless cable service providers may not be subject to local taxes in municipalities where they do not maintain a physical presence are discounted by legal precedent. The United States Supreme Court determined, in Quill Corp. v. North Dakota, 504 U.S. 298, 112 S.Ct. 1904 (1992), that the "minimum-contacts" requirement of the Due Process Clause does not require a physical presence. Rather, the Supreme Court found that an out-of-state mail order business had sufficient minimum-contacts to justify a use tax imposed by the State of North Dakota where the business delivered merchandise by mail or common carrier across state lines. Similarly, a local tax on wireless cable services is consistent with the Due Process Clause, even if the provider is not physically present in the municipality, in terms of maintaining a permanent office and staff, as long as its contacts include mailing bills to subscribers who are residents of the municipality. To the extent that some presence in the state in which the tax is imposed may be required under the Commerce Clause, this requirement is easily satisfied because wireless cable service providers have offices and antennae in each state in which they do business and send bills to their customers within the state on a regular basis. For these reasons, there is no Commerce Clause issue.

The legislative action that the Committee is now considering would benefit a few with a high cost to many, including the citizens of the City of Chicago. I strongly encourage the Committee to consider economic realities, public policy and judicial precedent in the course of its deliberations on this important matter.

Statement of John Norcutt, President,
Independent Cable and Telecommunications Association
Before the House Judiciary Subcommittee
On Commercial and Administrative Law

August 7, 1996

My name is John Norcutt, and I am the President of the Independent Cable and Telecommunications Association (ICTA). I am also the President of Mid-Atlantic Cable, a private cable operator headquartered here in Washington, DC. ICTA is a national trade association representing the interests of the private cable industry, otherwise known as the SMATV (for satellite master antenna television) industry. ICTA's private cable operator members were the very first competitors to traditional wire-based franchised operators, demonstrating staying power since 1979 in a marketplace often characterized as "monopolistic." ICTA operator members offer consumers video services substantially equivalent in number and quality to that offered by cable franchisees, but at a substantially lower cost. In the last five years, the larger private cable operators have expanded the range of their service offerings to include telephony and data communications, well in advance of the expected provision of broadband services by other competitors. ICTA operator members concentrate their competitive entry efforts on serving residents of multiple dwelling units ("MDUs"), both rental and condominium, and related properties, such as hotels, motels, hospitals, and educational institutions. At this juncture, private cable operators serve over 2.5 million subscribers nationwide with video entertainment and information services and, with the passage of the Telecommunications Act of 1996, are expected to experience significant growth.

ICTA appreciates the opportunity to testify on the issue of whether Congress should exempt other multichannel video programming entities from local taxation in addition to the DBS industry.[1] ICTA believes that, in order to ensure consumers a competitive choice, it is essential that all similarly-situated video services providers be treated with regulatory parity. Congress should extend the DBS exemption from local taxation to other providers, including private cable operators. By singling out DBS, Congress has unintentionally led states and localities to assume

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[1] Section 602 of the Telecommunications Act of 1996 preempts local taxation of direct-to-home (DBS) satellite service.

that taxation of other like providers is not only permissible, but desirable. This is why it is most important that any expansion of the local taxation exemption specifically identify all similarly-situated providers. To do otherwise would only compound the competitive disadvantages of the current regime and such continuing partiality would undoubtedly crush the private cable industry.

Like DBS, private cable systems are not operated according to municipal boundaries, as traditional franchised cable television is. Private cable operators pursue opportunities nationwide or focus on a single large, multi-state region. Like DBS, private cable operators offer video services direct from a satellite to consumers. Where DBS has heretofore focused on the single family home marketplace, private cable largely services MDU properties. Thus, rather than each household having a separate satellite-receiver, all consumers residing within an MDU community are serviced via a central installation of receive-only satellite earth station(s) located wholly within private property boundaries. Because each MDU community has its own reception equipment, private cable operators, again like DBS, make no use of the public streets and rights-of-way. Private cable operators can also "interconnect" multiple MDU properties through the use of microwave technology as licensed by the FCC and for which federal regulatory fees are paid. Private cable operations are thus federally regulated, the FCC having preempted state and local franchising and related nonfederal barriers to entry over twelve years ago. Indeed, in that proceeding, the FCC found that the "potential for such state regulation to chill the development of SMATV service conflicts with our Congressional mandate, as embodied in the Communications Act, to foster the development of national communications service."[2/]

That same conclusion is even truer today given the passage of the Telecommunications Act of 1996. The Act's hallmark is the introduction of technology-neutral, non-discriminatory federal regulation designed to foster competition surrounding an array of telecommunications services. However, this national objective can and will be frustrated by the imposition of local tax burdens

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[2/] Earth Satellite Communications, Inc., 55 Rad. Reg. 2d (P & F) 1427, 1434 (1983), recon. denied, FCC 84-206 (May 14, 1984), aff'd New York State Comm'n on Cable Television v. FCC, 749 F.2d 804 (D.C. Cir. 1984).

on what is still a fledgling private cable industry, especially when one of its virtually indistinguishable competitors, DBS, is wholly exempt from such local taxation, and when another, the franchised cable industry, is permitted to offset its five percent franchise fee payment against the tax. Private cable competitors to the entrenched franchise cable industry thus shoulder a greater relative burden of any video programming tax, under circumstances where no public streets are used and where Congress has accordingly specifically banned the imposition of franchise fees. Such taxes do not advance consumer welfare. Essentially, the typical fifteen to twenty-five percent cost savings previously enjoyed by private cable subscribers will be eroded significantly by local schemes assessing a tax of seven to eight percent of gross revenues.

Private cable operators merely ask that their service not be singled out for taxation. If localities are able to impose franchise-like fees on fragile competitors, the risk is that such competitors will be driven out of the market altogether. Certainly their growth will be severly hampered. Regulatory parity is not only the fair avenue to pursue, but the route most advantageous to consumers and to the achievement of national procompetitive goals.

Accordingly, on behalf of ICTA, I urge Congress to alter its current inconsistent policy. Congress should create regulatory parity for all similarly-situated video services providers, including the private cable industry, in order to reach the goal underlying the landmark 1996 Act of vibrant, technology-neutral competition.

BELL ATLANTIC CORPORATION'S
COMMENTS CONCERNING PREEMPTION OF LOCAL TAXATION WITH RESPECT TO DIRECT-TO-HOME SERVICES (SECTION 602 OF THE TELECOMMUNICATIONS ACT OF 1996)
JULY 25, 1996

Bell Atlantic wishes to submit testimony regarding the narrow issue of whether the preemption of local taxation with respect to direct-to-home (DTH) satellite services should be extended to wireless cable service.

Summary:

Section 602 of the Telecommunications Act of 1996 (the "1996 Act") exempted DTH satellite service providers from collecting and remitting local taxes and fees on DTH satellite services. The exemption applies only to the programming provided by the DTH satellite service, not to taxes arising from the sale of equipment or to real estate taxes that would otherwise apply. Finally, the states are free to tax the sale of the service and, if they choose, to rebate some or all of such monies to localities.

From a tax standpoint, wireless cable service is essentially the same service as DTH satellite service. Both industries deliver programming to their consumers without the use of wires embedded in the communities' public rights-of-way. Wireless cable service providers deliver programming via radio communications, including terrestrial-based radio systems, directly to subscribers equipped with wireless cable service receivers at their premises. Surprisingly, wireless cable service providers did not receive the same exemption from collecting and remitting local taxes and fees on wireless cable service. Because of similarities in the delivery of programming by the service providers in each of these industries, there is no public policy reason for taxing wireless cable service differently than DTH satellite service. In fact, tax policy would generally dictate that similarly situated taxpayers be taxed similarly, and we believe this edict should apply here.

Why wireless cable service and DTH satellite service should be treated the same with respect to the imposition of local taxes and fees:

The two primary justifications given for providing DTH satellite service providers with an exemption from collecting and remitting local taxes and fees on DTH satellite services are (i) that the DTH satellite service providers do not have sufficient nexus with the individual communities that might otherwise be imposing local taxes and fees and (ii) that such an obligation would impose an onerous and unreasonable administrative burden on an emerging industry.

Local Nexus:

DTH satellite service providers argue that they are national, interstate companies that do not require use of the public rights-of-way or the physical facilities or services of communities. They

argue further that they provide national services, are based out-of-state, and do not lend themselves to the local aspects of franchise regulation. DTH satellite service providers also argue that, because programming is delivered via satellite directly to subscribers equipped with satellite receivers at their premises, there is no legal tax "nexus" for local governments to impose a tax or fee on the service. With some DTH satellite systems, the satellite receivers located at the subscribers residence are owned by the DTH satellite service providers -- presumably, the DTH satellite service providers' argument is that such physical presence is minimal and that the property is not located in the public rights-of-way. Similar to DTH satellite service providers, wireless cable service providers deliver programming via radio communications from radio communications towers directly to subscribers equipped with wireless cable service receivers at their premises, and there is only a minimal physical presence in the community and none in the public rights-of-way.

Cable television operators can be distinguished from both wireless cable and DTH satellite service providers. Cable operators have traditionally been subject to local franchise fees imposed by local franchising authorities because the cable operators receive the benefit of deploying facilities in the public rights-of-way. The 1996 Act authorizes a local franchising authority or other government entity to impose fees on the gross revenues of the an open video system (OVS) operator for the provision of cable service. Cable television operators and OVS operators provide service on local networks and have a physical presence in the communities in which such networks are located that requires them to obtain certain approvals from local government with respect to the deployment of such networks. While OVS operators are not subject to all the same approval requirements, they must pay fees in lieu of franchise fees. In addition, local governments' ability to manage the local rights-of-way is preserved.

Administrative Burden:

DTH satellite service providers argue that requiring out-of-state DTH satellite companies to track and comply with tens of thousands of local taxing schemes, as well as becoming subject to numerous audits in such local jurisdictions, would be an administrative nightmare. In addition, the administrative burden would have a devastating impact on the DTH satellite services industry.

Similarly, requiring out-of-state wireless cable companies to track and comply with tens of thousands of local taxing schemes and potentially becoming subject to audits in such jurisdictions would impose a crippling administrative burden. In addition, the administrative burden would have a devastating impact on the emerging wireless cable services industry.

Conclusion:

Because of the similarities between the DTH satellite services industry and the wireless cable services industry discussed above, the wireless cable services industry should receive comparable tax treatment to the DTH satellite services industry. Any favorable tax treatment with respect to local tax exemptions that is provided to DTH satellite service providers should be extended to wireless cable service providers, so that the competing programming services offered by each are subject to roughly equivalent taxation.

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